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In the
Supreme Court of the United States

OCTOBER TERM, 1963

No. 608

In the Matter of:

ROY J. NEERING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Petitioner, Roy J. Neering, by his undersigned attorney, Luke G. Galant, prays that a Writ of Certiorari issue to review Order, Opinion and Final Judgment of the Supreme Court of the State of Florida, entered on the 7th day of June, 1963[1],

1 Appendix "A"

petition for rehearing denied on July 16, 1963[2], discharging writ of certiorari previously issued[3] to District Court of Appeal, First District, State of Florida, to review Order, Opinion and Final Judgment entered by District Court of Appeal on June 14, 1962[4], which affirmed as to conviction but reversed and remanded as to sentence the Judgment of Conviction of May 15, 1961, by the Circuit Court, Duval County, Florida[5], finding petitioner herein guilty of indirect criminal contempt and sentencing him to one year in the County Jail.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (a 4 to 3 decision) is reported in 155 So. (2d) 874 and the revised opinion of the District Court of Appeal, First District, State of Florida, is reported at 141 So. (2d) 615.

JURISDICTION

The Supreme Court of Florida by Stay Order entered October 7, 1963[6], stayed enforcement and execution of the judgment of the trial court until the instant proceedings are disposed of.

By Order dated October 14, 1963[7], this Court extended the time for filing this Petition for a Writ of Certiorari until November 13, 1963.

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2 Appendix "B"
3 Appendix "C"
4 Appendix "D"
5 Appendix "E"
6 Appendix "F"
7 Appendix "G"

Jurisdiction of this Court is invoked pursuant to the statutory authority contained in Title 28, U.S.C.A., Sections 2101 et seq. and by virtue of Section 1 of Amendment XIV of the Constitution of the United States under which several substantial federal questions arise in this cause.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State, whose Constitution by express language secures the right of trial by jury to *all* and affords the right to trial by an impartial jury in *all* criminal prosecutions, can deny that right to a defendant accused of indirect criminal contempt of court, without this constituting a departure from due process and equal protection.

2. Whether despite findings by its own appellate courts, both intermediate and of last resort, that a defendant did not have the requisite intent to be guilty of indirect criminal contempt, a State may nevertheless convict a defendant thereof, without this constituting a departure from due process and equal protection.

3. Whether a State can simultaneously and in one action prosecute a defendant accused of indirect criminal contempt of court under both a Direct Information filed by the State Attorney and an Order for Rule to Show Cause entered by the Trial Judge, who additionally functions as trier of the facts, without this constituting a departure from due process and equal protection.

4. Whether a State can in a prosecution for indirect criminal contempt tried by the Trial Judge without a jury in Open Court at 3:00 P.M. of a certain day subpoena the state witnesses to appear before the Trial Judge in Chambers at 1:45

P.M. on the same day, without this constituting a departure from due process and equal protection.

5. Whether the Trial Judge, acting as trier of the facts without a jury in a prosecution for indirect criminal contempt, can after the State Attorney finishes his cross-examination of defendant, take over the cross-examination of the defendant and ask seven pages (as per the transcript) of questions which apparently reflect a prejudgment, without this constituting a departure from due process and equal protection.

6. Whether a State can file, docket, number and prosecute an indirect criminal contempt of court charge as a civil case, without this constituting a departure from due process and equal protection.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is Section 1 of Amendment XIV of the Constitution of the United States.[8]

The state constitutional provisions involved are Sections 3 and 11 of the Declaration of Rights of the Constitution of the State of Florida.[9] (Page 27a)

CONCISE STATEMENT OF THE CASE

Facts

On May 1, 1961, petitioner happened to be in the office of his attorney when the latter asked him concerning the qualifications as a juror of a friend of petitioner who was on the jury list for trials to be held the week of May 8, 1961. Petitioner assured his attorney that his friend would make a good

8 Appendix "H"
9 Appendix "I"

juror. Then on May 3, 1961, petitioner telephoned his friend (who was only a prospective and potential juror) and asked him if he would be averse to giving the plaintiff something for her injuries "if the facts warrant it". Petitioner made this inquiry openly and in the presence of a customer whom he knew to be a secretary for the law department of the very defendant involved in the damage suit.

Court Proceedings

The above was immediately reported to the Trial Judge and to the State Attorney. The latter prepared a Direct Information[10], but instead of first filing it and having an arrest warrant served upon petitioner he presented it to the Trial Judge who then issued an Order for a Rule to Show Cause[11], consequent upon which a Rule to Show Cause[12] was served upon petitioner May 10, 1961[13], returnable on May 15, 1961.

The various pleadings were filed, numbered and docketed as a civil case, and immediately prior to trial petitioner filed a motion to quash[14] the Information and the Rule to Show Cause, which was denied, and an Answer[15] much as he would in a civil action, admitting the conversation but denying any criminal intent.

The case was originally assigned to another Circuit Judge but by special order[16] the Trial Judge reassigned the case to himself, it having been in his division that the damage suit which figures in this matter found itself.

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10 Appendix "J"
11 Appendix "K"
12 Appendix "L"
13 Appendix "M"
14 Appendix "N"
15 Appendix "O"
16 Appendix "P"

The Trial Court in its Judgment of Contempt rejected the petitioner's contentions that he qualified his inquiry to the prospective juror with the words "if the facts warrant" and that he had no criminal intent.

Petitioner had no interest in the damage suit involved. He was not arrested before trial, he was never arraigned, and he was never given an opportunity to waive a jury. He was incarcerated immediately after trial and spent three days in jail before making bail under an appeal bond.

Appeal to the District Court of Appeal ensued; after that Petition for Writ of Certiorari was first granted and then discharged by the Supreme Court of Florida; and now Petition for Writ of Certiorari is before this Court.

The District Court of Appeal reversed the one year sentence and remanded the cause for the imposition of a new sentence not to exceed six months, and after the Writ of Certiorari was discharged by the Supreme Court of Florida, but before these proceedings were commenced the Trial Court re-sentenced petitioner to six months in jail. The new sentence was imposed without notice, without hearing and without the defendant being present. However, any error in connection therewith has not been before the District Court of Appeal or the Supreme Court of Florida; therefore, it cannot form any part of these proceedings.

Raising Federal Questions

It appears from the face of the opinions of the Supreme Court of Florida and of the District Court of Appeal that the federal questions as to due process and equal protection were more disregarded and ignored by each of these courts than considered, as far as expressly deciding them is concerned, as they both wrote primarily of lack of intent and of cruel

and inhuman punishment. However, since all the federal questions raised herein were also before them they had to dispose of such before considering the issues of intent and of cruel and inhuman punishment. It is settled law in this Court that even though a particular federal question was not expressly decided, if the judgment as rendered could not have been arrived at without deciding it then this Court will nevertheless entertain jurisdiction. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, and cases cited therein, pages 29 and 30.

All questions raised herein are believed to be contained directly or indirectly in the original assignments of error[17] filed in connection with the appeal from the trial court to the District Court of Appeal, particularly Assignments 6, 7, 9, 11, 18 and 21. The federal questions were exhaustively raised in Petitioner's brief in his capacity as appellant in that Court and they were raised in oral argument before the District Court of Appeal. Exceptions to the points raised were not taken in the trial court as either the various actions of the trial court could not have been anticipated or exceptions would have been useless acts.

The petition for writ of certiorari to the Supreme Court of Florida[18], Paragraph 5, referred to eleven points of law, "including questions of due process of law and denial of jury trial and constitutional rights", but it was of necessity directed primarily to asserted direct conflict between the opinion of the District Court of Appeal, First District and that the District Court of Appeal, Third District, as well as with opinions of the Supreme Court of Florida on the same points of law in order to vest jurisdiction with the Supreme Court of Florida.

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17 Appendix "Q"
18 Appendix "R"

and no brief was permitted, but certainly all the questions herein were fully raised in oral argument before the Supreme Court of Florida and also in Petition for Rehearing[19] filed with the Supreme Court of Florida, particularly Paragraphs 3 and 5 thereof. The petition for rehearing was denied without comment.

However, to cover all exigencies, the numerous radical departures from due process and equal protection listed hereinabove are plain errors of such fundamental nature that this Court may notice them notwithstanding any possible inadequacy in assigning some of them as error below or in the first instance, *Sibbach vs. Wilson & Co.*, 312 U.S. 1, "*** it was plain error of such a fundamental error that we should notice it"; and see also *Johnson vs. U.S.*, 318 U.S. 189, "It is true that we may of our own motion notice errors to which no exception has been taken if they would seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

REASONS RELIED ON FOR GRANTING WRIT

At present the charge of contempt of court is the wandering stepchild of American jurisprudence. It is often thought of as neither civil nor criminal but sui generis. In Florida there exist no rules, no regulations, no safeguards, and relatively few reported precedents concerning it whereby a person may be made aware of or apprized of what constitutes contempt of court. It is virtually whatever the trial court wants to make it, and under Florida law sentence is unlimited except for the constitutional prohibition against cruel and inhuman punishment.

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19 Appendix "S"

It is true that every court of general jurisdiction has, as it should, inherent power to punish for contempt. However, it should be remembered that there are four generally recognized classes of contempt, based upon whether it is direct (occurring in the presence of the court) or indirect (outside the presence of the court) and whether it is civil (affecting primarily the rights of parties) or criminal (attacking the dignity, integrity and function of the court itself). In the case of an indirect, criminal contempt such as petitioner herein stands charged with, in determining the question of guilt or innocence logical reason dictates that a defendant should have the benefit of all rights accorded every other defendant charged with a criminal offense.

For the foregoing reasons, therefore, this Court should impress upon a State which seeks to prosecute a person for indirect criminal contempt the safeguards and guidelines of due process and of equal protection.

ARGUMENT

Some broad principles have been enunciated by the Supreme Court of Florida on the general subject within which fall the questions herein presented for review, but petitioner asserts that those principles have not in the case at bar been given specific application.

In *Stokes v. Scott* (Fla., 1939), 189 So. 272, the gravamen of the alleged offense was proposed bribery of a grand juror, but the Supreme Court of Florida ordered the petitioner, who had been found guilty of indirect criminal contempt, released and discharged under a writ of habeas corpus. The Court stated:

"Such proposals must be proven *in the same manner*

and *to the same degree of certainty* as other criminal charges are proven if a valid ujdgment of contempt is to rest on them. United States v. Carroll, D.C., 147 F. 947; Note, 49 A.L.R. 987." (Emphasis Supplied)

• • •

"•••where, as in this case, the proceeding is of *the nature of criminal proceedings* and the evidence does not point conclusively to the charge made, emanates from a sole witness, and was not corroborated or convincing, and was of such a nature as to cast suspicion on said witness as guilty of improper conduct affecting his duty as a grand juror and his evidence was flatly denied and the denial corroborated, and the record as a whole does not clearly reveal a criminal intent, the court may on habeas corpus consider the legal sufficiency of the evidence to sustain the judgment, there being no other adequate remedy, and may make such order in the premises as will properly sustain the integrity of the Court and secure to petitioner his right of due process and equal protection of the law as required by Section Four of the Declaration of Rights." (Emphasis Supplied)

In *Marshall v. Clark* (Fla., 1950), 45 So. (2d) 667, again a case a indirect criminal contempt, in which petitioner was ordered released and discharged under a writ of habeas corpus after he had been accused of trying to corrupt and influence two veniremen who had been drawn to serve as jurors, the Court stated:

"Though it is the rule of this jurisdiction that in a contempt proceeding the determination of the facts and inferences to be drawn therefrom will generally be left to the decision of the trial judge, whose conclusion as to the acts done and as to their contemptuous

> character or effect, will not be lightly disturbed by this court on habeas corpus, Baumgartner v. Joughin, 105 Fla. 335, 141 So. 185, the rule is subject to the principle, that where the acts constituting the alleged contempt take place out of the presence of the Court and relate to improper proposals to influence the actions of jurors or other court officials in the performance of their official duties, such proposals must be proven in the same manner and to the same degree of certainty as other criminal charges are proven if a valid judgment of contempt is to rest on them."

The tenor of the foregoing has been extended, consistently so, by the District Court of Appeal, First District, State of Florida in *Local Lodge Number 1248, Etc. v. St. Regis Paper Co.* (Fla., 1961), 125 So. (2d) 337 wherein it held:

> "If *** the contempt is criminal in nature, the judgment is considered to be a final judgment as in any other criminal action and is reviewable only under Part 6 of the Florida Appellate Rules relating to criminal appeals."

In accord, *Pennekamp v. Circuit Court, etc.* (Fla. 1945), 21 So. (2d) 41, decided by the Supreme Court of Florida wherein it stated:

> "Contempt proceedings are criminal in nature. Rule 37 of this Court provides that appeals shall be taken in criminal cases in conformity to Section 290, Florida Criminal Procedure Act, F.S.A. §924.11."
> (Same case, 22 So. (2d) 875, reversed on other grounds, 328 U.S. 331)

Right To Trial By Jury

The prosecution's forte is that our judicial process cannot function properly without fair and impartial jurors. True, but where were the jurors at petitioner's trial? He was never afforded an opportunity to waive a jury trial, and he never waived his right to such. It is ironic and properly the subject of review by this Court that petitioner, who was convicted in an effort to uphold and strengthen the dignity of the jury system, was himself deprived of the benefit of a jury trial.

In view of the Stokes v. Scott decision, supra, and the Marshall v. Clark decision, supra, both by the Supreme Court of Florida to the effect that indirect crimnial contempt shall be considered in the nature of a criminal proceeding and that the charges therein must be proven in the same manner as all other criminal charges, how can the State of Florida validly grant to the latter, but deny to the former, the right of trial by jury?

Particularly is this true when the Constitution of the State of Florida does not mention, much less exclude from rights in any way, the offense of indirect criminal contempt. On the contrary, Section 3 of the Declaration of Rights recites that the right of jury trial:

> "•••shall be secured to *all*•••" (Emphasis Supplied)

and Section 11 of the Declaration of Rights guarantees that:

> "In *all* criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury•••" (Emphasis Supplied)

How can the State of Florida properly exclude a defendant

in an indirect criminal contempt case from the classification of *all*, under Section 3, or lawfully separate a prosecution for indirect criminal contempt from *all* criminal prosecutions, under Section 11?

Even procedurally, on appeal, indirect criminal contempt cases are under Florida law, ante, considered as all other criminal appeals!

It is petitioner's contention that in denying him a jury trial the State of Florida, in view of prior, established, and applicable decisions by its own court of last resort and of the particular language in its constitution, has denied and deprived him of due process and of equal protection under the supreme law of the land.

Conviction Despite Finding of No Intent

With or without a jury, the State of Florida could not without violating due process and equal protection convict petitioner of indirect criminal contempt of court in the face of positive and affirmative findings that he had no intent.

In its original opinion of May 17, 1962[20] the District Court of Appeal, First District, flatly found and held concerning petitioner's lack of intent:

> "•••The evidence indicates that *he did not harbor a criminal intent of any kind*•••". (Emphasis Supplied)
>
> • • •
>
> "•••there is *no indication* in the record that the *defendant had the slightest conception of the possible relation of his conduct to the administration of justice.*" (Emphasis Supplied)

20 Appendix "T"

When it was pointed out to the District Court of Appeal by petition for rehearing that without intent there could be no guilt, the above was altered some by the revised opinion of June 14, 1962 (which cut the sentence in effect from one year to no more than six months) to read:

> "The evidence indicates that his primary purpose was to be sure that he had not misled the lawyer in saying he thought Benoit would make a 'fair juror' ".
>
> • • •
>
> "• • • there is no indication in the record that the defendant fully appreciated the possible relation of his conduct to the administration of justice."

The line characterizing petitioner's actions as an "• • • offense • • • unwittingly committed" stayed in!

The three-man dissenting opinion of the Supreme Court of Flroida, whose detailed opinion is the only expression *on the merits* by that Court, declared unequivocally:

> "• • • there is a complete absence of criminal intent".
>
> • • •
>
> "There was nothing in Neering's conduct and deportment that points to criminal conduct."
>
> • • •
>
> "The record in this case conclusively shows that such error as Neering may have committed was unwittingly done."

All of the foregoing is completely and irrefutably contradictory and inconsistent with basic holdings of both the Supreme Court of the State of Florida and the Supreme Court of the United States.

The Supreme Court of Florida in *Florida Ventilated Awning v. Dickson* (Fla. 1953), 67 So. (2d) 219, went so far as to reverse a contempt order in a civil contempt situation for lack of intent, saying:

> "There was no intent to disobey the order and I understand intention to be one of the elements of contempt."

Yet, the District Court of Appeal and the Supreme Court of Florida in the present case, despite positive findings of a lack of intent, affirmed petitioner's conviction of indirect criminal contempt. It is difficult to perceive a grosser violation of either or both due process and equal protection.

This Court, in *Michaelson v. United States ex rel C. St. P., M. & O.R. Co.*, 266 U.S. 42, stated:

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains, and proof of guilt must be beyond reasonable doubt."

Fatal Procedural Errors

In its concluding remarks immediately prior to adjudication the Trial Court stated, "Mr. Neering's actions strikes at the heart of the administration of justice". This reflects an attitude of commendable zeal on its part, but like all good things zeal can be overdone, and the end does not justify the means.

The tremendous and inadvertently excessive zeal of the Trial Court is manifest in: its special order re-assigning the case from another division to its division (if petitioner could

not select his judge; why permit a judge to choose his defendant?); the speed of the proceedings (5 days after being served petitioner was convicted and in jail); the lack of arraignment; the one year sentence meted petitioner (in Stokes v. Scott, supra, defendant had gotten 30 days and in Marshall v. Clark, supra, defendant had gotten 60 days); and other relatively lesser departures from due process and from equal protection.

However, there exist at least four major fatal procedural errors in this case, largely stemming from the fact that the Trial Court apparently treated the case much the same as it would a civil contempt case or a direct criminal contempt case.

The first of these is the participation of the Trial Court, which ultimately sat as trier of the facts, in the prosecution of the charges. With the State of Florida being represented by the State Attorney who prepared and filed a Direct Information it was materially and critically erroneous for the Trial Court to additionally issue an Order for Rule to Show Cause, especially since the latter patently recited a prejudgment before any evidence was heard:

> "It appearing to the Court***that one Roy J. Neering has been guilty of contempt of and against this Court ***"

It should also be noted that neither the Information nor the Rule to Show Cause expressly charge, nor does the Judgment *specifically find*, petitioner to be guilty of indirect criminal contempt; and to compound the error, petitioner was on one hand served with the Rule to Show Cause but on the other was convicted under the Information.

Another major fatal departure consists of the State subpoenaeing its witnesses to appear before the Trial Court in

Chambers at 1:45 P.M.[21] whereas the trial itself was in Open Court at 3:00 P.M. This appears boldly on the face of the record, and while Petitioner does not ascribe any wrongdoing in connection therewith, its mere existence on the face of the record is something which should not be permitted to stand.

The third radical departure from due process and from equal protection occurred when the Trial Court, after the State Attorney finished cross-examining petitioner, asked seven pages (Pages 85 through 91) as per the transcript of testimony of questions which patently reflect a prejudgment by the Trial Court as to guilt. Examples are:

> "Mr. Neering, are you not aware it's wrong for you to contact a member of the jury panel or venire?"
>
> • • •
>
> "You were trying to influence the way he would vote in the case of Brendel against Winn-Dixie?"

The fourth major violation of due process lay simply in the fact that the case was filed, numbered and docketed as a civil case instead of a criminal case (see Deputy Clerk's Affidavit[22]). That, and even the styling (instead of being brought in the name of or in behalf of the public it was merely styled "In the Matter of Contempt Proceedings Against Roy J. Neering"), served to confuse and lure defense counsel into a false impression of defending a civil contempt charge. It is basic that a formal criminal accusation should be obvious and specific and the nature of the charge crystal clear.

The foregoing major procedural errors committed by the State of Florida in its prosecution of petitioner are so obvious

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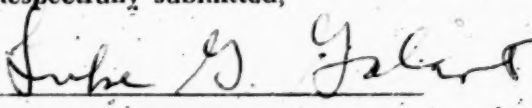
21 Appendix "U"
22 Appendix "V"

and so elementary that in this Petition it is not felt necessary to belabor the Court with any additional cases, citations or precedents. Actually nothing could add to or detract from the glaring violations of due process and of equal protection innate to this cause.

CONCLUSION

Accordingly, petitioner prays that this Honorable Court grant his Petition for Writ of Certiorari herein filed to review Order, Final Judgment and Opinion of the Supreme Court of the State of Florida.

Respectfully submitted,



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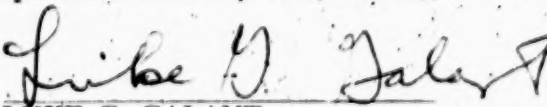
PROOF OF SERVICE

I DO CERTIFY that a copy hereof has been furnished to Richard W. Ervin, Attorney General, State of Florida, Tallahassee, Florida, Attorney for Respondent, by United States Mail, first class postage prepaid this sixth day of November, A.D. 1963.



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Appendix A

SUPREME COURT OF THE STATE OF FLORIDA

155 So. (2d) 874

ROY J. NEERING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

OPINION, JUNE 7, 1963

PER CURIAM.

The writs of certiorari having been improvidently issued, they should be and are

Discharged.

THOMAS, DREW, O'CONNELL and CALDWELL, JJ., concur.

ROBERTS, C. J., and TERRELL and HOBSON (Ret.), JJ., dissent.

TERRELL, Justice (dissenting).

This proceeding grew out of the following facts: While Roy J. Neering was consulting an attorney on other business, he was shown a list of prospective jurors and was asked if he knew anyone on the list. Neering replied that he knew one, Benoit, whom he thought would make a fair and impartial

juror. Said lawyer then advised Neering that he had a case against Winn-Dixie in which he represented a woman who had broken her hip. Later, on his own volition, Neering called Benoit, whom he knew because each of them owned and operated a beauty parlor. Neering then made the following statement to Benoit:

> "The reason I called you • • • is that I want you to do me a special favor. I have an attorney friend • • • who has a case coming up Tuesday. It's Brendel v. Winn-Dixie. You are on the jury list and there are a lot of insurance people and other undesirables that we don't like. I can't tell you anything about the case, but would you be averse to giving the old gal a little something for her pain and suffering, for her broken hip and leg? • • • That's fine." (WITNESS'S VERSION)
>
> *OR*
>
> "If the facts warrant it, would you be averse to giving the old gal something for her pain and suffering?" (NEERING'S VERSION)

On the basis of the facts so detailed, Neering was indicted, tried and found guilty of criminal contempt. He was sentenced to one year in jail. On appeal to the district court of appeal the judgment of the circuit court was affirmed as to conviction (141 So.2d 615), but it was reversed and remanded as to imposition of sentence. The district court of appeal ordered that a new sentence be imposed not to exceed six months in the county jail. The district court announced that it was doing so because, "There is no indication in the record that the defendant fully appreciated the possible relation of his conduct to the administration of justice."

From the judgment so entered, we are confronted by three appeals by certiorari: (1) Neering v. State, Case No. 31,865; (2) State v. Neering, Case No. 31,909, and (3) State v. Neering, Case No. 31,959, all of which have been consolidated for treatment because they involve substantially the same questions.

1. *In Neering v. State, Case No. 31,865*, Neering raises two grounds in support of jurisdiction:

(a) Neering asserts the district court's opinion *implies* that Neering did not "harbor any criminal intent" though it declined to reverse the conviction. Neering contends that this holding is in direct conflict with Marshall v. Clark, Fla. 1950, 45 So.2d 667; Stokes v. Scott, 138 Fla. 235, 189 So. 272, and Florida Ventilated Awning Co. v. Dickson, Fla. 1953, 67 So.2d 218. In answer to Neering's contention the state contends that there is no direct conflict on this point because the cases cited are distinguishable and because the district court's opinion did not find lack of criminal intent. A further reason is that in a criminal contempt proceeding, if an overt act is admitted, the offender is presumed to have intended the natural consequences thereof. Hence intent may not always be a required element. Croft v. Culbreath, Fla. 1942, 150 Fla. 60, 6 So.2d 638.

(b) The second point of direct conflict raised by Neering is that the district court's decision reducing the contempt sentence is in direct conflict with Geary v. State, Fla. App. 1962, 139 So. 2d 891, which holds that where the sentence is not illegal or excessive, an appellate court does not have the power to reduce it. The state in its brief takes two inconsistent positions in opposition to this point: (1) That Neering has no reason to complain since he benefitted by the reduced sentence, and (2) the state agrees that this portion of the decision of the district court of appeal is in direct conflict

with Geary v. State, supra, and other cases commencing with Brown v. State, Fla. 1943, 152 Fla. 853, 13 So.2d 458. In summary, as to Neering's petition, the state agrees on point (b) that this Court has jurisdiction and in fact bases its cross-petition and its independent petition for writ of certiorari on this point.

2. *State v. Neering, Case No. 31,909.* This is cross-petition for writ of certiorari by the state in which it alleges that the Supreme Court has direct conflict jurisdiction by virtue of the district court's reduction of Neering's sentence. The state contends such reduction conflicts with Geary v. State, supra, and two other cases.

3. *State v. Neering, Case No. 31,959.* Petition for writ of certiorari by the state alleging that the Supreme Court has jurisdiction on a direct conflict theory because the district court erroneously reduced Neering's sentence and that such reduction is in direct conflict with Geary v. State, supra, Brown v. State, supra, and other cases of the same tenor. Thus at one time or another, both the state and Neering take the position that this court clearly has jurisdiction by virtue of a direct conflict between district court's decision reducing petitioner's sentence and Brown v. State, supra, Geary v. State, supra, et cetera. Under prior decisions of this court, if we have jurisdiction on any ground, the entire case is before us for review. Tyrus v. Apalachicola Northern Railroad Co., Fla. 1961, 130 So.2d 590, and Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So.2d 594.

It thus appears that while Neering asserts other grounds of jurisdiction, both parties agree that we have jurisdiction on the direct conflict theory account of conflict between the opinion of the district court of appeal and Geary v. State, supra, Brown v. State, supra, and similar cases. We think any

question of our jurisdiction is removed by that portion of the district court of appeal's decision reducing Neering's sentence from one year imprisonment to six months imprisonment. This on authority of the same cases herein cited.

The real question in the case has to do with reduction of the trial court's penalty for contempt by the district court of appeal and the excessiveness of the penalty or failure of the court to equate the judgment for the alleged criminal contempt.

In any discussion of the subject of contempt one should not overlook the fact that contempts are generally classified as direct or indirect, sometimes referred to as constructive contempts. A direct contempt grows out of an act committed in the presence of the judge, while an indirect or constructive contempt arises from an act committed absent the presence of the court when sitting judicially. If committed in the absence of the judge, it must have been done under circumstances that reasonably tend to degrade the court, or to obstruct, interrupt, prevent or embarrass the administration of justice.

Whether or not intent is essential to contempt depends on the circumstances of the case. Where the act charged points clearly to contempt, intent may be inferred from doing the act. Many cases hold that intent is essential to contempt. Some authorities contend that it is only where the act alleged to be contemptuous is susceptible of two different interpretations that intent becomes an element. The fact that one charged with contempt did not intend to commit such an offense, may constitute a good defense to the charge, even though a technical contempt may have been committed. See Croft v. Culbreath, Fla. 1942, 150 Fla. 60, 6 So.2d 638, and

Section 10, 6 Fla. Jur., for an enlightening discussion of this phase of contempt. This is a case in which we think intent must be proven.

As previously stated, the district court reversed the trial court only as to the punishment imposed which was one year in jail. The district court ordered that this be reduced to six months in jail on the theory that it was excessive. In Brown v. State, 152 Fla. 853, 13 So. 2d 458, this court held that relief from an excessive sentence which did not violate statutory limitations was through the pardoning board. The Brown case has been reaffirmed in Walker v. State, Fla. 1950, 44 So.2d 814; La Barbera v. State, Fla. 1953, 63 So.2d 654; Emmett v. State, Fla. 1956, 89 So.2d 659; Hutley v. State, Fla. 1957, 94 So.2d 815, and Sanford v. State, Fla. 1959, 110 So.2d 1. See also Chavigny v. State, Fla. App. 1959, 112 So.2d 910.

In State ex rl. Grebstein v. Lehman, 100 Fla. 481, 129 So. 818, this court held that the power of the courts to punish for contempt is, however, limited by our Bill of Rights, under which a court cannot impose "indefinite" or "cruel and unusual punishment." Chief Judge Donald Carroll based the court's opinion reducing the judgment on this court's opinion in the Grebstein case. Judge Carroll also pointed out:

"The problem arising from the conflict between two vital considerations—the need to preserve the integrity of the court system and the idea of tempering justice with mercy when an offense is unwittingly committed—is illustrated in the case of Geary v. State [Fla. App. 1962], 139 So.2d 891, decided by the District Court of Appeal, Third District of Florida, * * *. In that case the defendant was found guilty of a charge of criminal contempt for discussing a cause in which he was a juror during the time that the court was in recess and against the admonition of the court."

As to judgments for contempt, the Grebstein case certainly had the effect of modifying Brown v. State, supra, and similar cases if the judgment of the trial court offended Section 8 of the Bill of Rights, Constitution of Florida, as we think it did.

As to the evidence in this case, we are limited to the findings of the district court of appeal as shown in the record before it, as well as its deductions therefrom. These show that Neering flatly denied that he had any interest in the case at bar and his evidence was not contradicted. Neering offered no inducement whatever to Benoit and the district court found the "evidence indicates that his [Neering's] primary purpose was to be sure that he had not misled the lawyer in saying that he thought Benoit would make a 'fair juror.'" The record shows that Nering knew nothing of court decorum or that he had any intent to interfere with the administration of justice; there is a complete absence of criminal intent. This court is committd to the doctrine that intent is a necessary element to convict one of criminal contempt in cases of this nature. This court is also committed to the doctrine that in a judgment of contempt based on improper proposals made to a member of a grand jury, the proposals must be proven in the same manner and to the same degree of certainty as other criminal charges.

In its opinion in this case the district court of appeal found that the "defendant [Neering] had no interest in the outcome of the litigation." Relying on the district court's evaluation of the evidence, it is our view that it does not meet the test to convict prescribed in Stokes v. Scott, supra. We think this evaluation is strengthened by the fact that Neering repeatedly denied that he had a purpose other than to make good on his suggestion or promise to his friend that Benoit would be a fair juror.

There was nothing in Neering's conduct and deportment that points to criminal conduct. For years he is shown to have made his bread and butter as the proprietor and manager of a beauty parlor. It does not stand to reason that one who spends his waking hour making homely faces good to look at, thus adding to his country's reservoir of pulchritude, would at the same time be concocting schemes that run counter to the administration of justice.

We think there was ample basis for the district court's holding that the judgment was excessive and should not be allowed to stand.

In imposing sentence in this case the trial court appears to have overlooked the "vital consideration" referred to by Judge Donald Carroll in his decision of this court's opinion in the Grebstein case—"the ideal of tempering justice with mercy when an offense is unwittingly committed." Mercy is a factor in the law that the confirmed legalist and others are prone to overlook in the administration of the criminal law; its function is to blend the law with discretion in such proportions as will save it from making a sham of justice. Justice is the sine qua non of every legal controversy. It is the handmaid of equity that was early designed to remove the harshness and delinquencies of the common law. It is not written in the books but like discretion resides in the breast of the judge and requires wisdom to appropriate it properly. There is no better test of a wise and skillful judge. The record in this case conclusively shows that such error as Neering may have committed was unwittingly done.

Informed judges and criminologists now tell us that the most effective and beneficial punishment is that which is equated with or has direct relation to the offense for which

it is imposed. Honorable Roy W. Russell, Chairman of the Florida Probation and Parole Commission, pointed this out very effectively in an address to the Circuit Judges Conference in Jacksonville recently. Based on twenty-one years of research and experience by the Probation and Parole Commission, said Mr. Russell, they have abandoned the old "concept of criminal justice that demanded an eye-for-an-eye, and a tooth-for-a-tooth", and that when now confronted with the criminal offender the question that concerns them is, "How can this individual who has harmed society be punished but not destroyed as a useful member of the community?" As the result of their study and treatment of the question, Mr. Russell said, "I am convinced that some criminals brought before our courts have personalities so warped and bent toward crime that their rehabilitation seems beyond our ability. But I am equally convinced that, reached in time, the great majority of our fellow citizens convicted of crimes are capable of changing into law-abiding citizens." In a second speech delivered to the Annual Southern Conference on Corrections, February 21, 1963, Mr. Russell points out that "nearly 90 per cent of those placed on probation with this Commission have made good," and that "more than 80 per cent of those released on parole in these 21 years have not committed another penal offense." Mr. Russell also points out in this connection, that as to Florida and many other states, the record shows that as to those who have been released after serving their sentence, 65 per cent of them return to prison for committing a second and often three or more crimes.

These figures certainly give us some light to equate judgments for criminal contempt. To commit one to jail for twelve months in face of the record here amounts to "cruel and unusual punishment." It may be that Neering wagged his tongue when he should have put brakes on it and kept his mouth

shut. We do not condone his conduct; in fact, we agree that it deserves censure, but by the rule of proof announced in Stokes v. Scott, supra, he was not proven guilty of criminal contempt. In the Stokes case petitioner was sentenced to serve thirty days in the county jail and to pay a fine of $100. If he defaulted in payment of the fine, he was required to serve an additional thirty days in jail. In imposing the judgment, the court had the correct idea of equating it to the offense for which it was imposed. The court said:

> "We are therefore convinced that the integrity of the trial court and the right of the petitioner will be best served by remanding the petitioner to the custody of the sheriff with directions to the trial court to discharge him unless evidence legally sufficient to support the charge is duly adduced."

The imposition of a judgment for contempt is one of the most delicate duties a court is called on to perform. It is not fixed by statute but is controlled by mercy and discretion and the facts of the case. It should be corrective, not punitive, and it should be made clear that it is not imposed for committing a crime but for interfering with the essential and orderly processes of the law. It should be administered in such doses and in such a manner as will tend to rehabilitate instead of making a hardened criminal. To imprison one for twelve months or even six months for contempt who knew nothing of court decorum, who did not "appreciate the possible relation of his conduct to the administration of justice," and for other reasons revealed by the record savors too strongly of "cruel and unusual punishment" condemned by Section 8 of the Declaration of Rights.

For the reasons so stated, Mr. Justice TERRELL, Mr. Chief Justice ROBERTS and Mr. Justice HOBSON dissent. We

would grant certiorari, quash the judgment of the district court of appeal and order respondent Neering remanded to the custody of the trial court with directions to discharge him unless evidence legally sufficient to support the charge be adduced.

Appendix B

SUPREME COURT OF THE STATE OF FLORIDA

Case No. 31,865

ORDER DENYING PETITION FOR REHEARING

JULY 16, 1963

On consideration of the Petition for Rehearing filed by Attorneys for Roy J. Neering,

IT IS ORDERED by the Court that the said Petition be, and the same is hereby, denied.

A True Copy

Test:

/s/ Guyte P. McCord, Clerk,
Supreme Court of Florida

Appendix C

SUPREME COURT OF THE STATE OF FLORIDA

Case No. 31,865

ROY J. NEERING,

Petitioner,

STATE OF FLORIDA,

v.

Respondent.

ORDER ALLOWING CERTIORARI, NOVEMBER 13, 1962

The Petition herein for a Writ of Certiorari to the District Court of Appeal of Florida, First District, is granted.

It is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the Petition, be filed as though in response to such Writ.

It is further ordered that said cause be set down for oral argument on jurisdiction and merits in due course.

Appendix D

DISTRICT COURT OF APPEAL, FIRST DISTRICT,
STATE OF FLORIDA
141 So.(2d) 615

ROY J. NEERING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REVISED OPINION, JUNE 14, 1962

CARROLL, DONALD, Chief Judge.

The defendant in a contempt proceeding has appealed from a judgment of contempt entered by the Circuit Court for Duval County, imposing a sentence of one year confinement in the county jail.

The essential facts disclosed in the record on appeal are as follows:

One Norman J. Benoit was served with a jury summons requiring him to appear in Circuit Court on May 8, 1961.

The defendant was in his attorney's office on certain business when another lawyer called him in his office to see if the defendant knew anybody on the jury list. He told the

lawyer that he knew Benoit, who he thought would make a fair and impartial witness for anybody." The lawyer told the defendant he had a case against Winn-Dixie, representing a Mrs. Brendel, who had broken her hip.

Both the defendant and Benoit operated beauty shops. On May 3, 1961, the defendant telephoned Benoit's shop and asked that the latter return the call. At about 6 P.M. Benoit returned the call while a lady who was employed as a legal secretatry by, and was a stockholder in, Winn-Dixie Stores, Inc., was in the defendant's chair for a beauty treatment. This lady testified that she heard the defendant say to Benoit: "The reason I called you . . . is that I want you to do me a special favor. I have an attorney friend . . . who has a case coming up Tuesday. It's Brendel v. Winn-Dixie. You are on the jury list and there are a lot of insurance people and other undesirables that we don't like. I can't tell you anything about the case, but would you be averse to giving the old gal a little something for her pain and suffering, for her broken hip and leg?. . . . That's fine." The defendant admitted this as the substance of his telephone conversation with Benoit, except that he claimed he said, "If the facts warrant it, would you be averse to giving the old gal something for her pain and suffering?"

The defendant further testified that he had not offered any inducement to Benoit and that his reason for the call was to relieve his "mental aggravation" from his conversation with the lawyer and wanted to put his own mind at ease after assuring the lawyer that Benoit would be a "fair juror."

Whether the defendant was attempting to influence, or only to ascertain, the attitude of the prospective juror, the defendant's conduct appears highly reprehensible to a lawyer

or judge who is keenly conscious of the vital importance in the administration of justice of the entitlement of every litigant to a fair and impartial jury, especially in our court system in which jurors are often the final arbiters of the facts. Nevertheless, while we do not condone such conduct, the average layman is probably unaware of this concept and might easily believe that there is nothing wrong in contacting the prospective juror as the defendant did. Here the defendant had no interest in the outcome of the mentioned litigation. The evidence indicates that his primary purpose was to be sure that he had not misled the lawyer in saying he thought Benoit would make a "fair juror." Under these circumstances, we feel that the sentence of imprisonment in the county jail for a period of one year is excessive and should not be allowed to stand.

The power of an appellate court in this state to review sentences which are within the limits prescribed by law is very restricted, but there still remains an area of appellate review of such sentences.

The rule in Florida as to the review of judgments of contempt is set forth in the case of State ex rel. Grebstein v. Lehman, 100 Fla. 481, 129 So. 818, *modifying* 100 Fla. 473, 128 So. 811 (1930), in which our Supreme Court said:

> "While this language must be construed in the light of the doctrine, which has also been recognized by this court, that no department of the government is, under our constitutional system, vested with unlimited and autocratic power, yet it correctly defines the attitude which this court has followed in liberally sustaining the nisi prius courts in their full constitutional power to compel obedience to their lawful orders and decrees and to enforce that salutary respect for the

courts as an institution of government without which respect for law itself cannot be maintained. But even the power of the courts to punish for contempt is limited by the Bill of Rights, and not even a court can impose 'indefinite' or 'cruel and unusual' punishments. See section 8 of the Declaration of Rights. However, it is quite likely that the indefinite imprisonment imposed in this case was due to mere inadvertence and that the court below would, in keeping with its past record of justice and moderation, have terminated the punishment imposed within a reasonable time had not this writ been sued out.

"Ordinarily an appeal does not lie from an order of a court of general jurisdiction imposing punishment for contempt of court. Caro v. Maxwell, 20 Fla. 717; Fla. Cent. & P. R. Co. v. Williams, 45 Fla. 295, 33 So. 991; Miller v. Miller, 91 Fla. 82, 107 So. 251. As at common law every court of record was the exclusive judge of contempt committed against its authority and dignity, the judgment of a court of competent jurisdiction inflicting punishment on the contemner was not, as a general rule, reviewable. 13 C.J. 97; 7 Am. & Eng. Ency. of Law, 33."

The problem arising from the conflict between two vital considerations—the need to preserve the integrity of the court system and the ideal of tempering justice with mercy when an offense is unwittingly committed—is illustrated in the case of Geary v. State, decided by the District Court of Appeal, Third District of Florida, opinion filed April 10, 1962, not yet reported. In that case the defendant was found guilty of a charge of criminal contempt for discussing a cause in which he was a juror during the time that the court was in recess and

against the admonition of the court. The trial court imposed a sentence of six months in the county jail. The District Court of Appeal said:

> "It has been held that the power to punish for contempt should be cautiously and sparingly exercised. Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 101 Fla. 468, 134 So. 529; Demetree v. State, Fla. 1956, 89 So. 2d 498. Yet it is natural and right that the court should be jealous of the integrity of the judicial process since there can be no surer way to harm our system of government than to have sown the seeds of suspicion and distrust for the ordinary processes of the law. While it is not contended that the sentence is illegal, appellant's third point is the nature of a petition for modification of the sentence and might more appropriately be directed to the trial judge. We will not disturb the sentence."

In the instant case, however, we have reached a contrary conclusion because of the greater severity of the sentence here and the fact that there is no indication in the record that the defendant fully appreciated the possible relation of his conduct to the administration of justice.

The judgment of contempt is reversed as to the sentence imposed, and the cause is remanded for the imposition of a new sentence not to exceed six months in the county jail.

Reversed and remanded with directions.

WIGGINTON and RAWLS, JJ., CONCUR.

Appendix E

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 61-739-L

IN THE MATTER OF
CONTEMPT PROCEEDINGS AGAINST
ROY J. NEERING.

JUDGMENT OF CONTEMPT, MAY 15, 1961

At the trial held in this matter this date, the motion of the respondent Roy J. Neering to quash the information for contempt citation filed herein was denied.

The respondent Roy J. Neering was present in court with his attorneys, Alan C. Winter Jr. and Gregory J. Darby. The Assistant State Attorney, Nathan Schevitz, was also present and, on behalf of the court, examined Mrs. Lorene McDonough, Norman J. Benoit and W. D. Jones, witnesses in support of the information for contempt citation. Those witnesses were cross-examined by the attorneys for the respondent, and the respondent produced and examined witnesses in his own behalf.

From the testimony and other evidence adduced at that trial, the court finds that on May 3, 1961, the respondent Roy J. Neering, knowing that one Norman J. Benoit had been

drawn to serve on the jury in the above entitled court during the week commencing May 8, 1961, did, prior to the appearance of said Norman J. Benoit in that court, attempt to influence the decision of the said Norman J. Benoit as a juror in that court in the manner set forth in paragraphs 1-3 of the information for contempt citation filed herein:

(1) On May 3, 1961, the case of Nettie M. Brendel and Fred J. Brendel, her husband, vs. Winn-Dixie Stores, Inc., a corporation, No. 60-1740-L, was pending in this court, and had been set for trial during the week beginning Monday, May 8, 1961, and tentatively assigned to be tried on Tuesday, May 9, 1961.

(2) One Norman J. Benoit had been duly served on April 29, 1961, with a summons to appear at 9:00 A. M. on May 8, 1961, to serve as a juror in this court for the trial of cases to be tried during that week beginning May 8, 1961.

(3) On May 3, 1961, the respondent Roy J. Neering, an acquaintance of the venireman Norman J. Benoit and a client of the law firm representing the plaintiffs Brendel in that case, who had discussed that case and that venireman with one of the attorneys representing those plaintiffs, said to the venireman Norman J. Benoit on the telephone, in substance and effect, "The reason I called you, Norm[illegible], I want you to do me a special favor. I have an attorney friend by the name of Hank who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. I can't tell you anything about the case -- in the meantime I see you are on the jury list, you are one of the jurors, and there are a lot of insurance people and other undesirables we don't like. Would you be averse to giving the old gal a little something for her pain and suffering and her broken hip and leg?"

The respondent Roy J. Neering in effect admits the foregoing, contending that he added words like "if the facts warrant" and that his intent was not criminal. The court rejects that contention.

The court finds further that the conduct of the respondent Roy J. Neering in that regard was wilful and contemptuous, and tended to embarrass this court in its legal and lawful operation, and to obstruct the administration of justice.

It is, therefore, ADJUDGED that:

1. The respondent Roy J. Neering is guilty of contempt of this court.

2. As punishment for that contempt, the respondent Roy J. Neering is committed to the custody of the Sheriff of Duval County, Florida, to be by said Sheriff confined in the Duval County Jail for the period of one year from the date of this order. The Clerk of this court shall issue to that Sheriff a writ of Commitment so stating.

DONE AND ORDERED at the Duval County Courthouse at Jacksonville, Florida, this May 15, 1961.

Roger J. Waybright

JUDGE.

Copies: Nathan Schevitz

Alan C. Winter Jr.

Gregory J. Darby

Thomas J. Carroll.

IN THE MATTER OF

CONTEMPT PROCEEDINGS AGAINST

ROY J. NEERING.

Case No. 61-739-L.

Thereupon in accordance with the above and foregoing Judgment of Contempt, Writ of Commitment was delivered to the Sheriff of Duval County, Florida, by the Clerk of the Circuit Court, Fourth Judicial Circuit of Florida, on this the 15th day of May, A. D. 1961.

It is now Considered by the Court and so Ordered that Court take recess until Tuesday, May 16th., A. D. 1961, at 9:00 O'clock A. M.

Appendix F

IN THE SUPREME COURT OF FLORIDA

Case No. 31,865

ROY J. NEERING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

STAY ORDER, OCTOBER 7, 1963

Upon consideration of Supplementary Petition for Stay by the above-named Petitioner, it is ordered that the execution and enforcement of the judgment of this Court discharging Writ of Certiorari entered on June 7, 1963, petition for rehearing denied July 16, 1963, in that certain cause recently pending herein wherein Roy J. Neering was Petitioner and State of Florida was Respondent, as well as the judgment of the District Court of Appeal of Florida, First District, and as well as the judgment of the Circuit Court of Duval County, Florida, be and they are hereby stayed for thirty (30) days from this date, to enable the petitioner to have a reasonable time in which to apply for and to obtain, if he can, a review of said cause by the Supreme Court of the United States, and if such proceeding is perfected and filed in the Supreme Court of the United States within said thirty (30) day period, that said judgment be further stayed until said proceeding is

disposed of by the Supreme Court of the United States or until the further order of this Court. This order is subject to cancellation at any time if petitioner fails to prosecute such review with reasonable dispatch.

Appendix G

SUPREME COURT OF THE UNITED STATES

No. ————————, October Term, 1963

ROY J. NEERING,

vs.

Petitioner,

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 13th, 1963.

/s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 14th
day of October, 1963

Appendix H

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix I

CONSTITUTION OF THE STATE OF FLORIDA

DECLARATION OF RIGHTS

SECTION 3. Trial by jury inviolate.-- The right of trial by jury shall be secured to all, and remain inviolate forever.

• • •

SECTION 11. Rights of accused; speedy trial; etc.-- In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury•••

Appendix J

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DUVAL COUNTY.

Case No. 61-739-L

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

INFORMATION FOR CONTEMPT CITATION

Comes now William A. Hallowes, 3rd, State Attorney for the Fourth Judicial Circuit of Florida, in and for Duval County, by Nathan Schevitz, Assistant State Attorney, for the Fourth Judicial Circuit of Florida, in and for Duval County, and under oath, information makes, that on May 3, 1961, one Roy J. Neering of the County of Duval and State of Florida, knowing that one Norman J. Benoit had been drawn to serve on the jury in the Circuit Court of Florida, in and for Duval County, during the week commencing May 8, 1961, did, prior to the appearance of the said Norman J. Benoit in said Court, attempt to influence the decision of the said Norman J. Benoit, as a juror in said Court, in that:

1. On the third day of May, 1961, there was then and there pending in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, before the Honorable Roger J. Waybright, one of the Judges of said Court,

a certain cause between Nettie M. Brendel and Fred J. Brendel, her husband, as plaintiff, and Winn-Dixie Stores, Inc., a Corporation, as defendants, same being Case No. 60-1740-L of said Court, and that said cause was set for trial for the week beginning Monday, May 8, 1961.

2. That one Norman J. Benoit of Jacksonville, Duval County, Florida, was duly served with a jury summons on April 29, 1961, which said jury summons required the said Norman J. Benoit to be and appear before the Honorable Judge o fthe Circuit Court, in and for Duval County, Florida, at the Court House at Jacksonville, Florida, on May 8, 1961, at 9:00 o'clock a.m. to serve as a juror in said Court, the name of the said Norman J. Benoit having theretofore been drawn by said Circuit Court of Duval County, Florida, and placed on the jury venire returnable before said Court on said May 8, 1961, at 9:00 o'clock a.m., as aforesaid.

3. That on May 3, 1961, one Roy J. Neering, who operates a beauty shop at 1523 San Marco Boulevard, Jacksonville, Florida, did from his aforesaid place of business speak to the said Norman J. Benoit on the telehone, and did then and there state and say to the said Norman J. Benoit, in substance and effect "The reason I called you, Norman, I want you to do me a special favor. I have an attorney friend by the name of Hank who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. I can't tell you anything about the case -- in the meantime I see you are on the jury list, you are one of the jurors, and there are a lot of insurance people and other undesirables we don't like. Would you be averse to giving the old gal a little something for her pain and suffering and her broken hip and leg?".

4. That such conduct on the part of him, the said Roy J.

Neering, was wilful and contemptuous and tended to embarrass said Court in its legal and lawful operation, and to obstruct the administration of justice.

WHEREFORE, your Petitioner respectfully prays the Court that a rule to show cause be issued by this Court, directed to the said Roy J. Neering, to show cause, if he can, at a time and place to be fixed by this Court, why he should not be adjudged in contempt of this Court for the reasons herein set forth, and punished accordingly.

Appendix K

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DUVAL COUNTY.

61-739-L, DIVISION - G

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

ORDER FOR RULE TO SHOW CAUSE

It appearing to the Court from the sworn Information of the State Attorney for the Fourth Judicial Circuit of Florida, in and for Duval County, that one Roy J. Neering has been guilty of contempt of and against this Court, in that on the third day of May, 1961, there was then and there pending in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, before the Honorable Roger J. Waybright, one of the Judges of said Court, a certain cause between Nettie M. Brendel and Fred J. Brendel, her husband, as plaintiff, and Winn-Dixie Stores, Inc., a Corporation, as defendants, same being Case No. 61-1740-L of said Court, and that said cause was set for trial for the week beginning Monday, May 8, 1961; that one Norman J. Benoit of Jacksonville, Duval County, Florida, was duly served with a jury summons on April 29, 1961, which said jury summons required the said Norman J. Benoit to be and appear before the Honorable Judge of the Circuit Court, in and for Duval County,

Florida, at the Court House at Jacksonville, Florida, on May 8, 1961, at 9:00 o'clock a.m. to serve as a juror in said Court, the name of the said Norman J. Benoit having theretofore been drawn by said Circuit Court of Duval County, Florida, and placed on the jury venire returnable before said Court on said May 8, 1961, at 9:00 a.m., as aforesaid; that on May 3, 1961, one Roy J. Neering, who operates a beauty shop at 1523 San Marco Boulevard, Jacksonville, Florida, did from his aforesaid place of business speak to the said Norman J. Benoit on the telephone, and did then and there state and say to the said Norman J. Benoit, in substance and effect "The reason I called you, Norman, I want you to do me a special favor. I have an attorney friend by the name of Hank who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. I can't tell you anything about the case -- in the meantime I see you are on the jury list, you are one of the jurors, and there are a lot of insurance people and other undesirables we don't like. Would you be averse to giving the old gal a little something for her pain and suffering and her broken hip and leg?".

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the said Roy J. Neering be and appear before this Court on the 15th day of May, A. D. 1961, at 3:00 o'clock p.m. in the County Court House at Jacksonville, Duval County, Florida, and show cause, if any he has, why he should not be adjudged guilty of contempt of and against this Court and punished accordingly.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Clerk of this Court do forthwith issue a Rule to Show Cause directed to the said Roy J. Neering in accordance with this order.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 9th day of May, A. D. 1961.

Appendix L

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DUVAL COUNTY.

61-739-L, DIVISION - C

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

RULE TO SHOW CAUSE

IN THE NAME OF THE STATE OF FLORIDA:

To: Roy J. Neering
1523 San Marco Boulevard
Jacksonville, Florida

It appearing to the Court from the sworn information of the State Attorney for the Fourth Judicial Circuit of Florida, in and for Duval County, that one Roy J. Neering has been guilty of contempt of and against this Court, in that on the third day of May, 1961, there was then and there pending in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, before the Honorable Roger J. Waybright, one of the Judges of said Court, a certain cause between Nettie M. Brendel and Fred J. Brendel, her husband, as plaintiff, and Winn-Dixie Stores, Inc., a Corporation, as defendants, same being Case No. 60-1740-L of said Court, and

that said cause was set for trial for the week beginning Monday, May 8, 1961; that one Norman J. Benoit of Jacksonville, Duval County, Florida, was duly served with a jury summons on April 29, 1961, which said jury summons required the said Norman J. Benoit to be and appear before the Honorable Judge of the Circuit Court, in and for Duval County, Florida, at the Court House at Jacksonville, Florida, on May 8, 1961, at 9:00 o'clock a.m. to serve as a juror in said Court, the name of the said Norman J. Benoit having theretofore been drawn by said Circuit Court of Duval County, Florida, and placed on the jury venire returnable before said Court on said May 8, 1961, at 9:00 o'clock a.m., as aforesaid; that on May 3, 1961, one Roy J. Neering, who operates a beauty shop at 1523 San Marco Boulevard, Jacksonville, Florida, did from his aforesaid place of business speak to the said Norman J. Benoit on the telephone, and did then and there state and say to the said Norman J. Benoit, in substance and effect "The reason I called you, Norman, I want you to do me a special favor. I have an attorney friend by the name of Hank who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. I can't tell you anything about the case -- in the meantime I see you are on the jury list, you are one of the jurors, and there are a lot of insurance people and other undesirables we don't like. Would you be averse to giving the old gal a little something for her pain and suffering and hre broken hip and leg?"

THIS IS, THEREFORE, TO COMMAND YOU, the said Roy J. Neering, to be and appear before Honorable Roger J. Waybright, one of the Judges of the aforesaid Circuit Court of Duval County, Florida, on the 15th day of May, A. D. 1961, at 3:00 o'clock p.m. at the Court House in Jacksonville, Duval County, Florida, and show cause, if any you have, why you

should not be adjudged guilty of contempt of and against said Court and punished accordingly.

WITNESS the Honorable Roger J. Waybright, Judge of said Court, and the seal of said Court at the Court House in the City of Jacksonville, County of Duval and State of Florida, on this 9th day of May, A. D. 1961.

Appendix M

CIRCUIT COURT, DUVAL COUNTY, FLORIDA

SHERIFF'S RETURN

No. 61-739-L
DIVISION - G

Received this writ on May 9, 1961 and executed same in Duval County, Florida on May 10, 1961 by delivering a true copy thereof to the within named to-wit: ROY J. NEERING. LHH DALE CARSON, Sheriff of Duval County, Fla. L. H. Hines, Jr., Deputy Sheriff.

Appendix N

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 61-739-L

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

MOTION TO QUASH

Comes now Roy J. Neering, by and through his undersigned attorneys of record, and respectfully moves this Honorable Court to quash the information for Contempt Citation and Rule to Show Cause thereafter served upon this Defendant on May 10, 1961, on the following grounds:

That the allegations as contained in Information for Contempt Citation are insufficient to sustain a judgment of contempt.

Appendix O

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 61-739-L

ANSWER

Comes now the Defendant, by and through his undersigned attorneys of record, and for Answer to Information for Contempt Citation, respectfully says as follows:

1. Answering Paragraph I, the Defendant respectfully says that he neither admits nor denies the allegations thereof for the reason that he is without personal knowledge of the allegations therein contained.

2. Answering Paragraph II, the Defendant says that he neither admits nor denies the allegations therein contained for the reason that he is without knowledge of the allegations thereof.

3. Answering Paragraph III, the Defendant admits that portion of said Paragraph in that he did speak with the said Norman J. Benoit on the telephone on the said date of May 3, 1961 but Defendant respectfully denies each and every the other allegations as contained in said Paragraph III.

4. Answering Paragraph IV, the Defendant denies each and every allegation thereof.

Appendix P

IN THE CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA.
DIVISION B.

NO. 61-739-L

IN THE MATTER OF CONTEMPT PROCEEDINGS
AGAINST ROY J. NEERING.

ORDER
RE-ASSIGNING CASE TO DIVISION B

Upon consideration, it is ORDERED that:

1. The rule to show cause issued herein having been issued by and being returnable before the judge sitting in division B of this court, with the concurrence of the judge sitting in division G this case is hereby re-assigned to division B of this court.

Appendix Q

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, AT LAW.

NO. 61-739-I

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

AMENDMENT TO, AND ADDITIONAL ASSIGNMENTS OF ERROR

The Appellant, Roy J. Neering, appealing to the District Court of Appeal, First District, to review the judgment and committment or sentence of the Circuit Court in and for Duval County, Florida, adjudging him guilty of contempt and imposing a sentence or committment of one year, within the time allowed by the Court's order of May 29, 1961, extending the time for filing assignments of error, files this, his amendment to and additional assignments of errors in the rulings and decisions of the Circuit Court relied upon by him on his appeal heretofore entered in this cause, to-wit:

1. The Court erred in finding that the allegations contained in the Information for Contempt Citation were sufficient to sustain a Judgment of Contempt.

2. The Court erred in denying or overruling the Respondent's Motion to Quash.

3. The Court erred in finding that the Respondent, ROY J. NEERING, was guilty of contempt of Court.

4. The Court erred in committing the Respondent to the custody of the Sheriff of Duval County, Florida, to be confined by the Sheriff in the Duval County Jail for a period of one year as punishment for such contempt.

5. The Court erred and grossly abused its discretion in committing the Respondent to the custody of the Sheriff of Duval County, Florida, to be by said Sheriff confined in the Duval County Jail for a period of one year as punishment for such contempt.

6. The Court erred in imposing a penal sentence on the Respondent under a criminal contempt charge, which was brought pursuant to an action at law.

7. The Court erred in entertaining jurisdiction of this cause prior to the filing of any complaint, information, or other pleading with the Clerk of the Circuit Court in and for Duval County, Florida.

8. The Court erred in re-assigning this cause without notice to appellant and in a manner contrary to the internal rules of practice adopted by the Circuit Court in and for Duval County, Florida.

9. The Court erred in entertaining and in accepting jurisdiction of a criminal or contempt cause of action or information designed solely for a criminal punishment, to wit: the imposition of a sentence or committment involving imprisonment and deprivation of liberty when said cause was mistakenly instituted as an action at law contrary to the statutes and rules of court of the State of Florida.

10. The sentence or committment imposed by the Court is illegal and void.

11. The Court erred in acting as jury and judge in a criminal proceeding and deprived appellant of his constitutional guarantee of a jury trial contrary to the applicable provisions of the State and Federal Constitution, to wit: the Fourteenth Amendment to the Constitution of the United States, and Sections 3, 8, 10 and 11 of the Declaration of Rights of the Constitution of the State of Florida.

12. The sentence imposed is cruel and excessive and violates Section 8 of the Declaration of Rights of the Constitution of the State of Florida.

13. The sentence imposed by this Court exceeded and went beyond the Court's jurisdiction, authority, and discretionary powers.

14. The Court erred in holding that the direct information filed herein stated a cause of action and in holding that said direct information complied with the pertinent substantive and procedural statutes of Florida and the applicable rules of Court.

15. The judgment of contempt and sentence or committment is contrary to law and the weight of the evidence.

16. The direct information failed to charge an offense.

17. The Court lacked jurisdiction of the cause.

18. The appellant was not present at all proceedings incident to this cause where his presence was required under the

criminal procedure law, and the Court may have inadvertently received evidence out of Court which evidence was not given in the presence of the appellant.

19. The Court erred in not making available to appellant, prior to trial by the Court, a copy of the testimony and statements taken by the State Attorney, which testimony and statements provided the basis for the Information for Contempt Citation filed in this Cause.

20. The Court erred in admitting hearsay testimony and in basing the judgment of contempt on hearsay testimony.

21. The Court erred in summarily and arbitrarily rejecting appellant's uncontradicted testimony that his conversation with the prospective juror was qualified and limited by appellant's statement to said prospective juror, to wit: "if the facts warrant".

22. The purported judgment of contempt entered by the Court is not in fact a "final" judgment of contempt and does not provide a legal basis for imposition of a sentence or committment.

23. The Writ of Committment issued by the Clerk of the Circuit Court is illegal and void.

24. The Court erred in overruling the several objections made by appellant to hearsay testimony and testimony irrelevant to and beyond the scope of the issue in this cause.

25. The Court erred in basing its judgment and sentence on the uncorroborated testimony of a biased witness employed by the defendant in the civil actions out of which the alleged contempt of court arose.

26. The Court erred in entering judgment against and imposing sentence or committment upon appellant.

27. The Court erred in improperly delegating judicial authority to the Clerk of the Circuit Court of Duval County, Florida.

Appendix R

IN THE SUPREME COURT OF FLORIDA

CASE NO. 31,865

ROY J. NEERING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, ROY J. NEERING, presents this, his Petition for a Writ of Certiorari, and states:

1. Petitioner seeks to have reviewed a decision of the District Court of Appeal, First District, dated the 17th day of May, 1962, and filed in the records of said District Court on the 17th day of May, 1962, in Minute Book 2, page 2, and a revised decision of the District Court of Appeal, First District, dated the 14th day of June 1962, and filed in the records of the District Court on the 14th day of June, 1962, in Minute Book 2, page 14.

2. This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution and Rule 4.5 (c) of the Florida Appellate Rules.

3. This Petition is accompanied by a certified Transcript of the Record of the proceedings, including the decisions Petitioner seeks to have reviewed and a supporting Brief.

4. The following are the facts of the case:

(a) Petitioner was adjudged guilty of contempt by the Circuit Court in and for Duval County, Florida, and sentenced to one year's confinement in the county jail. (Tr. pp. 1,6)

(b) The basis upon which the judgment of contempt was entered resulted from a telephone call made by Petitioner to a friend of his, whose name appeared on a jury list containing the names of persons to be called for jury duty for then forthcoming civil trials in Duval County, Florida. (Tr. pp 2,7)

(c) Based solely on certain statements alleged to have been made by the Petitioner during said telephone conversation, and notwithstanding Petitioner's testimony to the effect that the statements alleged o have been made by him were taken out of context and did not convey the complete statement or the true intent of the Petitioner, and the further testimony of the Petitioner that he had not offered any inducement to the prospective juror and that his sole reason for making the call was to confirm his opinion that the prospective juror would make a fair and impartial juror, the Petitioner was adjudged guilty of contempt. (Tr. pp 2,7)

(d) The evidence failed to establish or disclose any criminal intent of any kind on the part of the Petitioner or that Petitioner had any interest in the outcome of the litigation; the evidence further disclosed that Petitioner's only purpose in making the phone call was to be sure that he had not been misleading in saying he thought the prospective juror would make a "fair juror". (Tr. 3,8)

5. On the basis of the record and Brief on appeal, the District Court of Appeal, First District, was presented with 11 points of law, including questions of due process of law and denial of jury trial and constitutional rights. However, after determining the foregoing facts, the Court, in effect, passed on only two points of law, to-wit:

(a) The sufficiency of the evidence to sustain an adjudication of contempt.

On this point of law, the District Court of Appeal, First District, rendered the following decision or holding:
After holding that the evidence indicated that Petitioner did not harbor any criminal intent of any kind, that the Petitioner had no interest in the outcome of the litigation involved, and that Petitioner's only purpose was to be sure that he had not been misleading in saying he thought the prospective juror would make a "fair juror", the District Court of Appeal, First District, did, nevertheless, in effect affirm the lower court's adjudication of contempt.

(b) The excessiveness of the sentence and the authority of an Appellate Court to modify the contempt sentence.

On this point of law, the District Court of Appeal, First District, rendered the following decision or holding:

The Court found that the sentence was excessive and that there is an area of appellate review of sentences that is within the limits prescribed by law and that they had the right to modify this sentence.

6. The same point of law as presented in 5 (a) above was involved in the case of MARSHALL v. CLARK, decided by the Supreme Court of Florida, en banc, on the 14th day of April, 1950. This decision was reported in 45 So. 2d 667. The facts involved in MARSHALL v. CLARK were as follows:

The Petitioner was cited for contempt of court for attempting to corrupt and influence the decision of two veniremen who had been drawn to serve at a term of court in which a criminal case was to be tried. In answer to the Rule to Show Cause, the Petitioner denied the charges made by the Rule. After submission of evidence on the issue, the Circuit Judge found that the allegations of the Rule had been proven and substantiated by the evidence and sentenced the Petitioner to serve 60 days in the county jail. The question before the Court was whether the evidence was sufficient to sustain the contempt Order entered by the Circuit Judge. On these facts, the Supreme Court of Florida, en banc, ruled as follows:

> "Though it is the rule of this jurisdiction that in a contempt proceeding the determination of the facts and inferences to be drawn therefrom will generally be left to the decision of the trial judge, whose conclusion as to the acts done and as to their contemptuous character or effect, will not be lightly disturbed by this court on habeas corpus, BAUMGARTNER v. JOUGHIN, 105 Fla. 335, 141 So. 185, the rule is subject to the principle, that where the acts constituting the alleged contempt take place out of the presence

> of the Court and relate to improper proposals to influence the actions of jurors or other court officials in the performance of their official duties, *such proposals must be proven in the same manner and to the same degree of certainty as other criminal charges are proven if a valid judgment of contempt is to rest on them.* See STOKES v. SCOTT, 138 Fla. 235, 189 So. 272; WILLIAMS v. SCOTT, 138 Fla. 239, 189 So. 272." (Italics added)

The same point of law as presented in paragraph 5 (a) above was also involved in the case of STOKES v. SCOTT, Sheriff, decided by the Supreme Court of Florida on the 23rd day of May, 1939. This decision was reported in 138 Florida 235 and 189 So. 272. The facts involved in STOKES v. SCOTT were as follows:

Petitioner was cited for contempt by the Circuit Court for improper proposals by the Petitioner to a member of the grand jury, to-wit: to cause the grand jury to adjourn without returning any indictments. The Supreme Court found from the evidence that the record as a whole did not clearly reveal a criminal intent. On these facts, the Supreme Court ruled as follows:

> "The acts constituting the alleged contempt took place out of the presence of the Court and related to improper proposals by Stokes to a member of the Grand Jury, to wit, the foreman, as may be seen by inspecting that part of the special presentment quoted. Such proposals must be proven in the same manner and to the same degree of certainty as other criminal charges are proven if a valid judgment of contempt is to rest on them. UNITED STATES v. CARROLL, D.C., 147 F. 947; Note, 49 A.L.R. 987.

"It may be laid down as a general rule that the credibility or the weight of conflicting testimony will not be considered or reviewed in habeas corpus from a judgment of contempt based on improper proposals to a grand juror but where, as in this case, the proceeding is of the nature of criminal proceedings and the evidence does not point *conclusively* to the charge made, emanates from a sole witness, and was not corroborated or convicing, and was of such a nature as to cast suspicion on said witness as guilty of improper conduct affecting his duty as a grand juror and his evidence was flatly denied and the denial corroborated, and *the record as a whole does not clearly reveal a criminal intent*, the court may on habeas corpus consider the legal sufficiency of the evidence to sustain the judgment, there being no other adequate remedy, and may make such order in the premises as will properly sustain the integrity of the Court and secure to petitioner his right of due process and equal protection of the law as required by Section Four of the Declaration of Rights."
(Italics added)

The same point of law as set forth in paragraph 5 (a) hereinabove was involved in the case of FLORIDA VENTILATED AWNING CO., INC. et al. v. DICKSON, et al., decided by the Supreme Court of Florida, Division A, on the 28th day of July, 1953. This decision was reported in 67 So. 2d 218. The facts involved in FLORIDA VENTILATED AWNING CO., INC., et al. v. DICKSON, et al. were as follows:

Appellants were adjudged guilty of contempt for violation of the terms of a final decree of the lower court. The evidence disclosed that there was no intentional contempt. On these facts, the Supreme Court of Florida ruled as follows:

"There was no intent to disobey the Order and I understand intention to be one of the elements of contempt . . . The contempt order is, therefore, reversed."

The same point of law as is set forth in 5 (b) above was involved in the case of WILLIAM A. GEARY, appellant, v. STATE OF FLORIDA, appellee, decided by the District Court of Appeal of Florida, Third District, on the 10th day of April, 1962. This decision was reported in 139 So. 2d 891. The facts involved in GEARY v. STATE OF FLORIDA were as follows:

The appellant was found guilty of a charge of criminal contempt for discussing a cause in which he was a juror during the time that the court was in recess and against the admonition of the court. The appellant was sentenced to serve six months in the county jail. On the question of the excessiveness of the sentence and the authority of an Appellate Court to modify the contempt sentence, the District Court of Appeal of Florida, Third District, ruled as follows:

". . . It has been held that the power to punish for contempt should be cautiously and sparingly exercised. SEABOARD AIR LINE RY. CO. v. TAMPA SOUTHERN R. CO., 101 Fla. 468, 134 So. 529; DEMETREE v. STATE ex rel. MARSH, Fla. 1956, 89 So. 2d 498 Yet it is natural, and right that the court should be jealous of the integrity of the judicial process since there can be no surer way to harm our system of government than to have sown the seeds of suspicion and distrust for the ordinary processes of the law. While it is not contended that the sentence is illegal, appellant's third point is in the nature of a petition for modification of the sentence and might more appropriately be

directed to the trial judge. We will not disturb the sentence."

7. The decision of the District Court of Appeal, First District, which Petitioner seeks to have reviewed, is in direct conflict with the abovementioned decisions of the Supreme Court of Florida and of the District Court of Appeal, Third District. Because of the reasons and authorities set forth in Petitioner's Brief, it is believed that the decision herein sought to be reviewed is erroneous and that the conflicting decisions of the Supreme Court of Florida and of the District Court of Appeal, Third District, are correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari and enter its Order, quashing the decision and Order hereby sought to be reviewed, approving the decisions of the Supreme Court of Florida and the District Court of Appeal, Third District, as the correct decisions, and granting such other and further relief as may seem right and proper to the Court.

Appendix S

IN THE SUPREME COURT OF FLORIDA

CASE NO. 31,865

ROY J. NEERING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, ROY J. NEERING, files this, his Petition for Rehearing, respectfully requesting this Honorable Court to reconsider its Order filed herein on June 7, 1963 discharging the three Writs of Certiorari which it had previously issued.

As grounds for rehearing, Petitioner Neering respectfully suggests that although three of the seven justices agree with the contention of your petitioner, as set forth in the opinion of Mr. Justice Terrell, concurred in by Mr. Chief Justice Roberts and Mr. Justice Hobson, the majority of this Honorable Court apparently overlooked or were not made cognizant of several vital factors most of which are discussed in the opinion

of Justices Terrell, Roberts and Hobson. Among those factors are the following:

1. *Direct Conflict*: There exists patently on the face of the respective opinions a direct conflict confusing to the Bench, the Bar and the public, as between the instant case of *Neering v. State*, Fla., 141 So. (2d) 615, decided by the District Court of Appeal, First District and *Geary vs. State*, Fla., 139 So. (2d) 891, decided by the District Court of Appeal, Third District. In the latter case appellant had been found guilty of indirect criminal contempt and one of his major points was that a six month jail sentence was unreasonably harsh. The Third District held this was in the nature of a petition for modification which might more appropriately be directed to the trial judge, whereas the First District in the present case held in effect it had the power to reduce the maximum legal sentence that could reasonably be given and it actually exercised that power.

Both parties to this cause contend the foregoing direct conflict exists, and the three Justices of this Honorable Court who have written an opinion or concurred therein agree with the contention of both parties in this respect.

The First District emphasized the direct conflict by stating it had reached a contrary conclusion to that reached by the Third District.

Additionally, there exists direct conflict on the same point of law between the revised opinion of June 14, 1962 by the District Court of Appeal in the instant case which found that petitioner Neering did not fully appreciate the possible relation of his conduct to the administration of justice (having first found in opinion filed May 17, 1962 that petitioner Neering did not harbor a criminal intent of any kind and did not

have the slightest conception of the possible relation of his conduct to the administration of justice) and the decisions by this Court requiring specific intent as a necessary element of a contempt conviction. *Stokes v. Scott* 189 So. 272, and *Florida Ventilated Awning Co. v. Dickson*, 67 So. (2d) 218.

2. *Matters Reviewable*: If jurisdiction is found to lie in this Honorable Court, the entire case is before it for review, *Tyus v. Apalachicola Northern Railroad Co.*; 130 So. (2d) 590.

3. *Lack of Intent*: The finding by the District Court of Appeal that petitioner Neering did not fully appreciate the possible relation of his conduct to the administration of justice does not conform to the rule of guilt beyond a reasonable doubt. Criminal contempt must be proven in the same degree of certainty as other criminal charges are proven, *Marshall vs. Clark*, 45 So. (2d) 667.

4. *Excessive Sentence*: In view of the multiple findings by both the District Court of Appeal and Justices Terrell, Roberts and Hobson as to nature of the misunderstanding and misadventure involved and the lack of criminal intent, the original sentence of one year and the subsequent six month sentence were violative of Section 8 of the Declaration of Rights of the Constitution of the State of Florida as being cruel and inhuman punishment.

5. *Lack of Due-Process*: In violation of Section 12 of the Declaration of Rights of the Constitution of the State of Florida and of the Fourteenth Amendment to the Constitution of the United States, with respect to due process of law, are the following:

(a) At the trial the State Attorney's office prosecuted for the State, but the trial Court instead of remaining impartial

until all the evidence was adduced assisted the State Attorney in cross-examining petitioner Neering with leading questions and questions indicating defendant was prejudged (See Pages 85 through 91 of Record on Appeal, Volume II).

(b) The witnesses for the State were subpoenaed to appear before the Trial Court in his Chambers at 1:45 P.M. on May 15, 1961, whereas the Information and Rule to Show Cause were returnable at 3:00 P.M. on May 15, 1961, in open court (See Pages 4 and 5 of Record on Appeal, Volume I).

(c) The Trial Court, manifesting throughout some of the attributes of investigator, prosecutor, judge and jury, issued an Order for Rule to Show Cause prior to the trial of the facts which stated that it appeared petitioner Neering was guilty of contempt (See Pages 3 and 4 of Record on Appeal, Volume I).

(d) An Information was presented to the trial Court and the trial Court by way of unnecessary duplication issued an Order for Rule to Show Cause both before any case was officially filed in the office of the Clerk of the Circuit Court for Duval County (See Pages 30 and 31 of Record on Appeal, Volume I).

(e) The case, filed and tried under a "Law" designation instead of a "Criminal" designation, was filed in Division "G" of the Circuit Court, but by his own Order the Judge of Division "B", who had issued the Order for Rule to Show Cause and who tried the case, reassigned the case to Division "B" (See Pages 31 and 5 of Record on Appeal, Volume I).

(f) There was no arraignment.

(g) The trial Court completely ignored its duty under Section 921.07, Florida Statutes, prior to the imposition of sentence.

(h) The Trial Court made no inquiry into possible mitigating circumstances and gave petitioner Neering no opportunity to suggest such inquiry, Section 921.13, Florida Statutes.

(i) The Judgment of Contempt (Pages 11 through 13 of Record on Appeal, Volume I) found petitioner guilty of contempt but did not specifically adjudicate him to be guilty of criminal contempt.

6. *Other Matters*: This Honorable Court's attention is directed to the fact that by sheer inadvertence the opinion mentions on Page 2 thereof that Petitioner Neering was indicted. Actually he never was, the case having been commenced by an Information and an Order for a Rule to Show Cause. Also, on Page 4 of the opinion there is mention made that petitioner Neering's sentence was reduced from one year imprisonment to six months imprisonment. The latter should have been "not to exceed" six months.

WHEREFORE your petitioner respectfully prays that a rehearing be granted based upon any one or more of the grounds under numbers 1 through 5 above and that a majority of this Honorable Court adopt and concur in the reasoning and judgment of the written opinion by Mr. Justice Terrell, Mr. Chief Justice Roberts and Mr. Justice Hobson.

Appendix T

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT,
STATE OF FLORIDA, JANUARY TERM, A.D. 1962

CASE NO. C-441

ROY J. NEERING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

OPINION, MAY 17, 1962

CARROLL, DONALD, Chief Judge.

The defendant in a contempt proceeding has appealed from a judgment of contempt entered by the Circuit Court for Duval County, imposing a sentence of one year confinement in the county jail.

The essential facts disclosed in the record on appeal are as follows:

One Norman J. Benoit was served with a jury summons requiring him to appear in Circuit Court on May 8, 1961.

The defendant was in his attorney's office on certain business when another lawyer called him in his office to see if the defendant knew anybody on a jury list. He told the lawyer that he knew Benoit, who he thought "would make a fair and impartial witness for anybody." The lawyer told the defendant he had a case against Winn-Dixie, representing a Mrs. Brendel, who had broken her hip.

Both the defendant and Benoit operated beauty shops. On May 3, 1961, the defendant telephoned Benoit's shop and asked that the latter return the call. At about 6 P.M. Benoit returned the call while a lady who was employed as a legal secretary by, and was a stockholder in, Winn-Dixie Stores, Inc., was in the defendant's chair for a beauty treatment. This lady testified that she heard the defendant say to Benoit: "The reason I called you . . . is that I want you to do me a special favor. I have an attorney friend . . . who has a case coming up Tuesday. It's Brendel v. Winn-Dixie. You are on the jury list and there are a lot of insurance people and other undesirables that we don't like. I can't tell you anything about the case, but would you be averse to giving the old gal a little something for her pain and suffering, for her broken hip and leg? . . . That's fine." The defendant admitted this as the substance of his telephone conversation with Benoit, except that he claimed he said, "If the facts warrant it, would you be averse to giving the old gal something for her pain and suffering?"

The defendant further testified that he had not offered any inducement to Benoit and that his reason for the call was to relieve his "mental aggravation" from his conversation with the lawyer and wanted to put his own mind at ease after assuring the lawyer that Benoit would be a "fair juror."

Whether the defendant was attempting to influence, or only to ascertain, the attitude of the prospective juror, the defendant's conduct appears highly reprehensible to a lawyer or judge who is keenly conscious of the vital importance in the administration of justice of the entitlement of every litigant to a fair and impartial jury, especially in our court system in which jurors are often the final arbiters of the facts. Nevertheless, while we do not condone such conduct, the average layman is probably unaware of this concept and might easily believe that there is nothing wrong in contacting the prospective juror as the defendant did. Here the defendant had no interest in the outcome of the mentioned litigation. The evidence indicates that he did not harbor a criminal intent of any kind, indicating only that his purpose was to be sure that he had not misled the lawyer in saying he thought Benoit would make a "fair juror." Under these circumstances, we feel that the sentence of imprisonment in the county jail for a period of one year is excessive and should not be allowed to stand.

The power of an appellate court in this state to review sentences which are within the limits prescribed by law is very restricted, but there still remains an area of appellate review of such sentences.

The rule in Florida as to the review of judgments of contempt is set forth in the case of State ex rel. Grebstein v. Lehman, 100 Fla. 481, 129 So. 818, *modifying* 100 Fla. 473, 128 So. 811 (1930), in which our Supreme Court said:

> "While this language must be construed in the light of the doctrine, which has also been recognized by this court, that no department of the government is, under our constitutional system, vested with unlimited and

autocratic power, yet it correctly defines the attitude which this court has followed in liberally sustaining the nisi prius courts in their full constitutional power to compel obedience to their lawful orders and decrees and to enforce that salutary respect for the courts as an institution of government without which respect for law itself cannot be maintained. But even the power of the courts to punish for contempt is limited by the Bill of Rights, and not even a court can impose 'indefinite' or 'cruel and unusual' punishments. See section 8 of the Declaration of Rights. However, it is quite likely that the indefinite imprisonment imposed in this case was due to mere inadvertence and that the court below would, in keeping with its past record of justice and moderation, have terminated the punishment imposed within a reasonable time had not this writ been sued out.

"Ordinarily an appeal does not lie from an order of a court of general jurisdiction imposing punishment for contempt of court. Caro v. Maxwell, 20 Fla. 717; Fla. Cent. & P. R. Co. v. Williams, 45 Fla. 295, 33 So. 991; Miller v. Miller, 91 Fla. 82, 107 So. 251. As at common law every court of record was the exclusive judge of contempt committed against its authority and dignity, the judgment of a court of competent jurisdiction inflicting punishment on the contemner was not, as a general rule, reviewable. 13 C.J. 97; 7 Am. & Eng. Encyc. of Law, 33."

The problem arising from the conflict between two vital considerations—the need to preserve the integrity of the court system and the ideal of tempering justice with mercy when an offense is unwittingly committed—is illustrated in the case of Geary v. State, decided by the District Court of Appeal,

Third District of Florida, opinion filed April 10, 1962, not yet reported. In that case the defendant was found guilty of a charge of criminal contempt for discussing a cause in which he was a juror during the time that the court was in recess and against the admonition of the court. The trial court imposed a sentence of six months in the county jail. The District Court of Appeal said:

> "It has been held that the power to punish for contempt should be cautiously and sparingly exercised. Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 101 Fla. 468, 134 So. 529; Demetree v. State, Fla. 1956, 89 So. 2d 498. Yet it is natural and right that the court should be jealous of the integrity of the judicial process since there can be no surer way to harm our system of government than to have sown the seeds of suspicion and distrust for the ordinary processes of the law. While it is not contended that the sentence is illegal, appellant's third point is in the nature of a petition for modification of the sentence and might more appropriately be directed to the trial judge. We will not disturb the sentence."

In the instant case, however, we have reached a contrary conclusion because of the greater severity of the sentence here and the fact that there is no indication in the record that the defendant had the slightest conception of the possible relation of his conduct to the administration of justice.

The judgment of contempt is reversed as to the sentence imposed, and the cause is remanded for the imposition of a new sentence not to exceed six months in the county jail.

Reversed and remanded with directions.

WIGGINTON and RAWLS, JJ., CONCUR.

Appendix U

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DUVAL COUNTY

CASE NO. 61-739-L

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST ROY J. NEERING.

PRAECIPE FOR WITNESS SUBPOENA

To the Clerk Circuit Court, Fourth Judicial Circuit of Florida, in and for Duval County.

You will please issue witness subpoena directed to the following named persons, commanding them to be and appear before the Honorable Roger J. Waybright, Judge of the above-entitled Court at Circuit Court Chambers at 1:45 o'clock P.M. on Monday, the 15th day of May A. D. 1961, to testify in that certain matter before him pending entitled "In the Matter of Contempt Proceedings Against Roy J. Neering:

Mrs. Lorene McDonough - c/o J. Shepard Bryan
General Office, Winn-Dixie Stores
5050 Edgewood Court

Norman J. Benoit - Cameo Beauty Salon
3554 St. John's Avenue

W. D. Jones - Court Reporter, Court House

AND OBLIGE
s/ NATHAN SCHEVITZ
ATTORNEY FOR STATE

Appendix V

Affidavit of Deputy Clerk, Circuit Court, Duval County, Florida, July 3, 1961

AFFIDAVIT

COUNTY OF DUVAL

ss

STATE OF FLORIDA

Personally appeared before me, the undersigned authority, Jeanice Thomas, a deputy clerk of the Circuit Court of Duval County, Florida, who, being first duly sworn, deposes and says:

That she is familiar with the manner in which the above-styled cause was filed in the Clerk's Office of the Circuit Court of Duval County, Florida; that the Information for Contempt Citation subsequently filed in this cause was initially presented directly to the Honorable Roger J. Waybright, Circuit Judge, without first being filed in the Clerk's Office; that the Honorable Roger J. Waybright thereupon entered an Order for Rule to Show Cause; that, after said Order for Rule to Show Cause was entered by the Honorable Roger J. Waybright, the said Information for Contempt Citation and the said Order for Rule to Show Cause were then first filed in the office of the Clerk of the Circuit Court of Duval County, Florida; that the Honorable Nathan Schevitz, Assistant State Attorney for the Fourth Judicial Circuit of Florida, in and for Duval County, Florida, filed said Information for Contempt Citation and said Order for Rule to Show Cause and the same

was assigned by the Clerk as a *Law* case; that said cause was assigned number 61-739-L and was further originally assigned to Division "G" of the Circuit Court of Duval County, Florida, which division is presided over by the Honorable Albert W. Graessle, Jr., Circuit Judge.

Further Affiant sayeth not.

Jeanice Thomas (LS)
Affiant

Sworn to and subscribed before me this 3rd day of July, A.D., 1961. C. Wendell Martin, Notary Public, State of Florida at Large. My commission expires Mar. 27, 1964.

(Notarial Seal)

No. 608

Office Supreme Court, U.S.
FILED
FEB 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

ROY J. NEERING,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES W. KYNES
Attorney General

JAMES G. MAHORNER
Assistant Attorney General

COUNSEL FOR RESPONDENT

TABLE OF CITATIONS

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IN THE

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Petitioner,

-vs-

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Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PRELIMINARY STATEMENT

The petition for writ of certiorari supports the allegations of fact by references to those court opinions found in its appendix. The state likewise will support statements of fact made in this response by appropriate references to the same opinions relied on by petitioner. For purposes of saving print-

ing costs, such references will be to the appendix of petitioner's petition.

STATEMENT OF THE FACTS

The defendant-petitioner, after learning that a certain friend of his was a member of the venire from which the jury for a particular case would be chosen, called such friend and stated:

> "The reason I called you . . . is that I want you to do me a special favor. I have an attorney friend . . . who has a case coming up Tuesday. It's Brendel vs. Winn-Dixie. You are on the jury list and there are a lot of insurance people and other undesirables that we don't like. I can't tell you anything about the case, but would you be averse to giving the old gal a little something for her pain and suffering, for her broken hip and leg?" (See Appendix D, page 15a).

The petitioner alleges that he added the comment "If the facts warrant it . . .", to the above quote; however, such allegation was adverse to the testimony of the witness to whom the petitioner was speaking.

STATEMENT OF THE CASE

The state attorney, after receiving information of the above facts, prepared a direct information and submitted such to the court. After such charging instrument was presented to the trial judge, such judge issued an order for a rule to show cause, which was served upon petitioner on May 10, 1961, and made returnable on May 15, 1961. The criminal jurisdiction of the circuit court which suffered the contempt of the petitioner was limited to capital cases, and therefore the pleadings were filed and numbered as a case at law.

Petitioner was sentenced to one year by the trial court, but on appeal such sentence was found to be excessively harsh, and reduced to six months in an unprecedented action by the appellate court. (See appendix D, 14a through 18a).

The state, as well as the petitioner, took certiorari to the Florida Supreme Court, and writs of certiorari were granted to both parties. Such writs were later found to have been improvidently issued, and were therefore discharged. (Appendix A, page 1a of petitioner's petition for writ of certiorari filed in this court indicates that the denial of the writs of certiorari occurred in the case of Neering vs. State of Florida; such is highly misleading and inaccurate, as will be shown by a reference to the true case styling found at 155 So.2d 874, which is *Roy J. Neering*, petitioner, vs. *State of Florida*, respondent; *State of Florida*, cross-petitioner, vs. *Roy J. Neering*, cross-respondent; *State of Florida*, petitioner, vs. *Roy J. Neering*, respondent.)

Petitioner now seeks review through his petition for writ of certiorari to the United States Supreme Court.

QUESTIONS INVOLVED

The following questions will parallel the issues raised by their corresponding numbers in the petition for writ of certiorari.

QUESTION ONE

WHETHER A STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION BY FAILURE TO AFFORD A JURY TRIAL TO THOSE ACCUSED OF CONTEMPT OF COURT.

QUESTION TWO

WHETHER THE ACTION OF THE PETITIONER CONSTITUTED THE CRIME OF CONTEMPT.

QUESTION THREE

WHETHER A JUDGE IS DISQUALIFIED FROM PRESIDING OVER CONTEMPT PROCEEDINGS WHICH WERE DIRECTED AT HIMSELF OR AT HIS COURT.

QUESTION FOUR

WHETHER THE APPEARANCES OF WITNESSES IN THE VICINITY OF THE COURT APPROXIMATELY ONE HOUR BEFORE THE HEARING WOULD CONSTITUTE A VIOLATION OF DUE PROCESS EVEN THOUGH SUCH WITNESSES DID NOT CONSULT WITH THE TRIAL JUDGE.

QUESTION FIVE

WHETHER THE QUESTIONING OF THE PETITIONER BY THE TRIAL COURT CONSTITUTED A VIOLATION OF DUE PROCESS OF LAW.

QUESTION SIX

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED BY FILING THE CASE AT LAW IN A COURT WHOSE CRIMINAL JURISDICTION WAS LIMITED TO CAPITAL CASES.

ARGUMENT

QUESTION ONE

WHETHER A STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION BY FAILURE TO AFFORD A JURY TRIAL TO THOSE ACCUSED OF CONTEMPT OF COURT.

In court proceedings in matters of contempt the determination of fact and inferences therefrom is for the trial judge. See *Baumgartner vs. Joughin*, 105 Fla. 335, 141 So. 185. As recently as the case of *Dodd vs. State*, Fla. App., 110 So.2d 22, Florida reiterated the state rule applicable to all citizens of this state that a conviction of indirect criminal contempt will be sustained even though such conviction was entered without benefit of a jury.

The commandments of the sixth and seventh amendments, which require a jury trial in *criminal and certain civil* cases in the federal courts are not picked up by the due process clause of the fourteenth amendment so as to become limitations upon the states. *Fay vs. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043.

In light of the above authority it is clear that petitioner's position that he was denied his federal constitutional right by the failure of the state to provide him with the services of a jury must fall. It is further clear that since, under the law of this state, no citizen is entitled to a jury trial on charges of contempt, petitioner was not subjected to any discriminatory practice.

As is demonstrated by the case of *United States vs. United Mine Workers of America*, 330 U.S. 258, 298, 91 L.Ed 884, 915, the federal government has recognized that contempts may be tried without a jury even where such contempt occurred outside the direct judicial view of the court. Such case involved a violation of a labor strike injunction which occurred at the place of employment, well outside the courtroom. The United States Supreme Court stated "The defendants, we think, were properly tried by the court without a jury." It is therefore quite clear that contempt proceedings and contemners are in a classification reasonably distinctive from those proceedings wherein juries may be appropriate. Insomuch as trial by jury is the rule in most federal cases, it is clear that the United States Supreme Court has recognized contempt proceedings as distinguishable from those proceedings wherein jury trials are provided. The purpose of contempt proceedings is to uphold judicial dignity, and such purpose is best served by the judiciary.

The petitioner has not been denied equal protection of the law inasmuch as none of the citizens of this state who fall within this distinctive class are permitted jury trials as a matter of right.

QUESTION TWO

WHETHER THE ACTION OF THE PETITIONER CONSTITUTED THE CRIME OF CONTEMPT.

Petitioner, in his question two of the petition for writ of certiorari, which is corollary to the instant question, urges that the First District Court of Appeal of Florida, as well as the Florida Supreme Court, found that he had no intent to commit contempt of court. Such allegation is contrary to the facts. Reference to the case of *Roy J. Neering*, petitioner, vs. *State of Florida*, respondent; *State of Florida*, cross-petitioner, vs. *Roy J. Neering*, cross-respondent; *State of Florida*, petitioner, vs. *Roy J. Neering*, respondent, reported at 155 So.2d 874, reveals that the majority opinion made no finding whatsoever regarding the intent of the petitioner. The minority dissenting opinion certainly can not be relied upon to establish the facts of the case, as such opinion is adverse to the holding in the case.

It is likewise clear that the opinion of the First District Court, as revised, makes no finding in regard to the intent of the petitioner. Such court initially found that petitioner had demonstrated no malicious intent, but upon reconsideration, struck such finding, presumably because it was not accurate, and the opinion in its final form fails to hold that petitioner lacked that intent necessary to justify conviction for contempt. See *Neering vs. State*, 141 So.2d 615. The information upon which petitioner was charged and the judgment and sentence of the trial court specifically state that the petitioner attempted to influence the decisions of a juror. *Thus there is a clear finding of intent.*

In the case of *Baumgartner vs. Joughin*, 105 Fla. 335, 141 So. 185, the Florida court laid down the reasonable rule that if the actions with which petitioner was charged must, under any reasonable construction, result in an obstruction to the administration of justice, then the intent to do such act is sufficient to sustain a conviction for contempt.

As is shown by the statement of the facts, the petitioner made clear to a particular juror that his own friends were those who represented the plaintiff in a particular case. The juror could have no possible doubt as to where the petitioner's sympathies lay. The conversation, reduced to its basic form, illustrates that a friend of a given juror called such juror, asked for a special favor, and though he never specifically named such favor, he demonstrated his own sympathies and interests by the further mentioning of pain and suffering so that the juror would have reason to support that cause with which the caller sympathized.

In the case of *Sloan vs. Brown*, 114 Fla. 739, 154 So. 514, wherein the contempt consisted of asking a juror to look after the interest of the contemner, the Supreme Court indicated that if the overt acts of the alleged contempt were proved, the offender may be presumed to be guilty of contempt, where such acts would result in an interference with the orderly administration of justice.

It was the intent of the instant petitioner to make a conversation and communication which would reasonably influence the juror. Such intent is sufficient to sustain the conviction. Of course, if the petitioner had not known that the listener was a member of the jury venire, then he would have lacked that criminal intent necessary to uphold the judgment of the lower court, but the fact that he had the intent to make a communication to a juror which would reasonably interfere with the unbiased administration of justice by such juror is sufficient to sustain the conviction rendered.

Petitioner may not have had a malicious motive as distinguished from intent; however, it is clear that regardless of absence of malicious motive, or even the absence of motive, petitioner may nevertheless be guilty as charged.

It is therefore submitted that even if the question of intent is not considered under the restrictive limits of constitutional

issues such question must be resolved against the petitioner. It is a fortiari that such question must be resolved against petitioner if considered only within the narrow limits of federal constitutional issues.

QUESTION THREE

WHETHER A JUDGE IS DISQUALIFIED FROM PRESIDING OVER CONTEMPT PROCEEDINGS WHICH WERE DIRECTED AT HIMSELF OR AT HIS COURT.

This question is in opposition to question three presented on page three of the petition for writ of certiorari. Such question is as follows:

> "Whether a State can simultaneously and in one action prosecute a defendant accused of indirect criminal contempt of court under both a Direct Information filed by the State Attorney and an Order for Rule to Show Cause entered by the Trial Judge, who additionally functions as trier of the facts, without this constituting a departure from due process and equal protection."

Since it is apparent that the addition of a direct information to the order for rule to show cause only serves to more clearly inform the petitioner of the charges against him, and could, in no way have acted to petitioner's prejudice, the question as stated in the petition for writ of certiorari reduces down to the sole issue as to whether the trial judge's act of presiding over the case of contempt directed at his court, wherein he had issued the order to show cause, violated the defendant's right to due process. The basis for disqualification is that the trial judge can not act impartially in the case. The United States Supreme Court wisely approved the action of a trial judge who held in contempt certain attorneys who had engaged in that which amounted to a conspiracy against such judge in the case of *Sacher vs. United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451. It is clear that in the instant case where there was no misconduct directed at the presiding judge, there was less reason to interpose a presumption of prejudice than was present in the *Sacher* case, supra. It thus

must follow that the judge was not disqualified from presiding over those contempt proceedings which involved a contempt directed at his court.

QUESTION FOUR

WHETHER THE APPEARANCE OF WITNESSES IN THE VICINITY OF THE COURT APPROXIMATELY ONE HOUR BEFORE THE HEARING WOULD CONSTITUTE A VIOLATION OF DUE PROCESS EVEN THOUGH SUCH WITNESSES DID NOT CONSULT WITH THE TRIAL JUDGE.

The fact that certain state witnesses were subpoenaed by the state attorney to appear at the judge's chambers at a time prior to the time designated in petitioner's subpoena initially caused this office some concern; however, an investigation revealed that the witnesses were called early by the state attorney so that he could fully interview them before trial, and that such procedure is usual throughout the state. The petitioner was not called at such time because his basic rights against self-incrimination precluded a pre-trial interview. The witnesses were not called for the purpose of giving pretrial testimony before the judge, but were only subpoenaed to the vicinity of the judge's chambers for the purpose of being questioned by the state attorney outside of such chambers. Such location was chosen so that after the interviews were completed, the witnesses would be on hand to appear in the judge's chambers for the purpose of giving trial testimony.

The petition for writ of certiorari, in effect—and with some candor—acknowledges that no wrongdoing is ascribed to the procedure followed but nevertheless urges that just the fact that the state witnesses were subpoenaed at an early time should be held to violate petitioner's federal constitutional rights to due process of law. Such position is so unique that the state has abandoned its search for a case wherein a ruling was made on such issue. It is patent that the petitioner, who

) as the burden of carrying the issue, has failed in his petition for writ of certiorari to sustain or support the question by any citation of authority.

The concern of this office for the petitioner's basic constitutional rights as well as its desire to insure that the concepts of basic "fair play" were not violated during the trial proceedings resulted in an affidavit from the assistant state attorney which set out the reasons for the early time designated by the subpoenas and the reason why the chambers of the judge were designated as the place for the witnesses to appear rather than the courtroom. (See appendix A to this brief). The state was not permitted to file such affidavit as a part of the record in the First District Court of Appeal evidently because it went to the question of presentation of ex parte testimony, and such possibility was not made an issue by the petitioner.

Petitioner is in the position of asking this court to presume prejudicial error from an occurrence which amounts to standard practice in the state of Florida. This court has previously held that prejudicial error will not be presumed. The wisdom of such holding is supported by the circumstance of the instant case where, in fact, there was no prejudicial error, and where lack of the presumption of prejudicial error would lead to a conclusion adverse to the true facts. The occurrence of erroneous appellate holdings can only be prevented by requiring petitioner to demonstrate the occurrence of that wrong which he has chosen to indirectly intimate by citing a circumstance, while at the same time, acknowledging that such wrong should not be ascribed to such circumstance, to wit: the petitioner is in the position of urging that this court assume that his basic right to a proper hearing was in some way denied by unknown wrongs which occurred between the time the witnesses were subpoenaed and the time the trial took place, even though he indicates that no wrong should be ascribed to the circumstance of the early calling of the witnesses.

QUESTION FIVE

WHETHER THE QUESTIONING OF THE PETITIONER BY THE TRIAL COURT CONSTITUTED A VIOLATION OF DUE PROCESS OF LAW.

As is demonstrated by the case of *United States vs. DeFillo*, 257 F.2d 835, 839, if questions elicited from a witness are for recognized purposes which are proper either on direct or cross-examination, prejudice does not arise merely because the questions are asked by the court. The *DeFillo* rule has been recognized extensively as is shown by the case of *People vs. Giacomino*, 347 Ill. 523, 180 N.E. 437, 84 A.L.R. 1168, and those annotations beginning at 84 A.L.R. 1172. The basis for any limitation upon the right of the trial court to question witnesses is the possibility that such questioning when directed from the bench rather than counsel may bias the jury against a particular party. In the instant case, where there was no jury to be adversely affected, it would appear that a wide scope should be granted to the general right of the trial judge to question witnesses. Since the judge was acting as a jury or factfinder, his conduct was similar to that of a juror questioning a witnesses. As is shown by *State vs. Anderson*, 155 P.2d 127, 159 A.L.R. 340, a court may, within its discretion, properly permit a juror to question a witness. The annotations which follow such case at 159 A.L.R. 347 provide extensive authority for the proposition that there is no error in permitting jurors to question witnesses where the questions asked would be proper if submitted by counsel.

The petitioner has lifted from the questions asked by the court only two questions as an example of the overall questioning. There follows in order each and every question asked by the court and the answer of the witness to such question is omitted as immaterial:

"Q Mr. Neering, the attorney to whom you refer as Mr. Shown, Mr. Gerald S-o-h-n, is he not?

A —

Q And he is either a partner or an associate of the law firm of Searcy & Sulik?

A —

Q Well, he is connected as either a partner or an associate with that firm, is that correct?

A —

Q What is the name on the door?

A —

Q And another one is H. M. Searcy?

A —

Q And Mr. Sohn or Sohn, however it's pronounced, represented you in some legal matter?

A —

Q What is the basis of your acquaintance with Mr. Searcy?

A —

Q What was it that Mr. Searcy said to you about this case when he called you into his office?

A —

Q Did Mr. Searcy ask you to contact Mr. Benoit?

A —

Q What was the purpose of your contacting Mr. Benoit?

A —

Q You had no motive?

A —

Q Did you think he would be a fair juror before you called him?

A —

Q Would his answer to your question have made any difference in your opinion as to whether he would be a fair juror?

A —

Q Why did you care whether he would be a fair juror, Mr. Neering?

A —

Q You have served as a juror?

A —

Q Mr. Neering, are you not aware that it's wrong for you to contact a member of the jury panel or venire?

A —

Q What purpose did you have, what effect did you think it would have on Mr. Benoit, your calling him about this particular case?

A —

Q What was your intention?

A —

Q What did you hope to accomplish by your call to Mr. Benoit?

A —

Q You were trying to influence the way he would vote in the case of Brendel against Winn-Dixie?

A —

Q Anything further?

A —"

(See pages 85-91, transcript of testimony and proceedings in the circuit court).

As can be seen from the above, the participation of the trial court was small when measured against the one hundred and fifteen pages of transcript of testimony.

It is submitted that insomuch as there was no jury to be prejudiced by the questions asked and such questions being of a proper nature, the fact that such questions were asked by a judge rather than an attorney should not provide the petitioner with grounds for reversal even if tested by rules of error and not by the more stringent rule of whether such practice violated due process of law so as to give rise to a federal question.

QUESTION SIX

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED BY FILING THE CASE AT LAW IN A COURT WHOSE CRIMINAL JURISDICTION WAS LIMITED TO CAPITAL CASES.

There is considerable authority for the view that civil and criminal contempt can be tried in the same proceeding. 91 L.Ed. 962. It is apparent that such proceeding could not be

labeled a criminal proceeding nor accurately labeled a civil proceeding. Neither could such proceeding accurately be labeled in equity or at law. Contempt proceedings are, by nature, a species in themselves and are not entirely comparable to any other. The Circuit Court in and for Duval County, Florida, would not have jurisdiction over the contempt proceeding if it was treated as strictly a criminal case. Such court only has jurisdiction over capital offenses. The court labeled the proceedings for the purposes of filing as "at law" because only indictments are utilized in such circuit court for criminal proceedings. Such label was strictly for the filing system of the clerk and was not for the benefit of appellant. Certainly any appellant who possessed the knowledge of law necessary to understand the "L" placed after the number of the case and thus be misled by such letter would certainly realize that the case contemplated a criminal proceeding when it was initiated by an information filed by the state attorney. The facts alleged by such information, if true, could only constitute criminal contempt.

The information was entitled in the matter of contempt proceedings against Roy J. Neering (Appendix J, 28a-petition). This is a criminal styling. 17 C.J.S. Contempt Sect. 69. If the proceeding had been for civil contempt, it would have been between the original parties of a suit and would have been instituted and tried as a part of the original cause and not as a separate proceeding. *Seaboard Air Line Ry. Co. vs. Tampa Southern Ry. Co.* (1931), 101 Fla. 468, 134 So. 529. Certainly a clerical error made by the clerk of the court which involved only the filing system numbers on the pleading should not be allowed to invalidate judicial proceedings where the party was on notice as to the characteristic of such proceedings through the fact that the state attorney was handling the proceedings; that the proceedings were initiated by an information; that the facts alleged by such information could only be a basis of a criminal contempt and that the title of such information indicated that the information was a separate

action from any civil action and was, therefore, by nature, a criminal contempt.

In the case of *United States vs. United Mine Workers of America*, 330 U.S. 258, 91 L.Ed. 884, the court was faced with the question of whether the ommission of the words "criminal contempt" in a rule to show cause was prejudicial error. The court concluded that such ommission did not substantially prejudice the defendants when they were fully informed by other circumstances that criminal contempt was charged. It is apparent that the general styling of the proceedings, as well as the fact that the state attorney and state were the parties in opposition to the petitioners, as distinguished from civil parties, clearly indicated to the petitioner's counsel, who carried the responsibility of defense, that such defense was concerned with a charge of criminal contempt.

CONCLUSION

Wherefore, it is concluded that not only was there no violation of the due process provisions of the fourteenth amendment, but that in fact the issues raised by the petition for writ of certiorari did not lie within the broad scope of reversible error.

WHEREFORE, this court is respectfully requested to deny the petition for writ of certiorari.

Respectfully submitted,

JAMES W. KYNES
Attorney General

JAMES G. MAHORNER
Assistant Attorney General

Counsel for Respondent

PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Petition for Writ of Certiorari to the Supreme Court of the State of Florida has been forwarded by mail to the Honorable Luke G. Galant, 311 First Bank & Trust Building, Jacksonville 2, Florida, Attorney for Petitioner, this _____ day of February, 1964.

_____

Of Counsel for Respondent.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA.
CASE NO. C-441

ROY J. NEERING,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

AFFIDAVIT OF ASSISTANT STATE ATTORNEY

STATE OF FLORIDA,

COUNTY OF DUVAL,

Before me, the undersigned authority, personally appeared Nathan Schevitz, who being by me first duly sworn deposes and says:

1. That he is an Assistant State Attorney of the Fourth Judicial Circuit of the State of Florida, and as such Assistant State Attorney did on May 9, 1961, file in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, an Information for contempt citation against Roy J. Neering, the Appellant in the above entitled proceedings.

2. Thereupon, pursuant to the order of Honorable Roger J. Waybright, one of the Judges of the said Circuit Court, a rule to show cause was issued by the Clerk of said Circuit Court on May 9, 1961, directing the said Roy J. Neering "to be and appear before Honorable Roger J. Waybright, one of

the Judges of the aforesaid Circuit Court of Duval County, Florida, on the 15th day of May, A. D. 1961, at 3:00 o'clock p.m. at the Court House in Jacksonville, Duval County, Florida, and show cause if any you have, why you should not be adjudged guilty of contempt of and against said Court and punished accordingly."

3. In connection with his presentation of the matters complained of in the Information for contempt citation, deponent, the said Assistant State Attorney filed with the Clerk of said Circuit Court on May 10, 1961, his praecipe for witness subpoenas directed to three witnesses to require their appearance "before Honorable Roger J. Waybright, Judge of the above entitled Court at Circuit Court Chambers." At the time of the filing of said praecipe Deponent presumed that the hearing on the aforesaid rule to show cause would be held before the said Judge in his Chambers. It was not until after the issuance of said witness subpoenas that Deponent was informed that the hearing would take place in one of the Courtrooms of the said Circuit Court rather than in the Chambers of the Judge.

4. As has been the practice in this Circuit, and in many other Circuits, the witness subpoenas were made returnable at 1:45 o'clock p.m. of the day of the hearing, although the hearing was set for 3:00 o'clock p.m. This was to give Deponent an opportunity to discuss further with the witnesses the issues in the cause and to interrogate them further regarding their proposed testimony. Deponent saw no necessity for causing the additional expense of issuing two separate sets of witness subpoenas, one returnable before the State Attorney at 1:45 o'clock p.m. and the other before the Judge at 3:00 o'clock p.m.

5. Deponent further says that he did talk to the witnesses upon their arrival at the Court House, interrogated them concerning the testimony which he intended to present to the Court at the hearing and made final preparations for

the said hearing, and that to the best recollection of Deponent, at no time did these witnesses or any of them, enter the Judges' Chambers.

Nathan Adams

Sworn to and subscribed before me this 18th day of April, 1962.

Notary Public, State of Florida at Large. My commission expires Jan. 16, 1965. Bonded by American Surety Co. of N.Y.